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In the
Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN W. EDWARDS, *et al., Petitioners,*

v.

SOJOURNER T., *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Louisiana Abortion Statute is unconstitutional in all of its possible applications and, if not, whether it can be enforced in its constitutionally permissible applications?

2. Whether, in light of the undisputed facts of human development and the recently acquired scientific evidence of the humanity of the unborn child, Louisiana's Abortion Statute is an appropriate and reasonable exercise of authority reserved to the states by the United States Constitution?

PARTIES TO THE PROCEEDING

The Defendants-Appellants below and Petitioners in the case at bar are **Edwin W. Edwards**, as Governor of the State of Louisiana; and **Richard P. Ieyoub**, as Attorney General of Louisiana. **Harry Connick, Sr.**, as District Attorney for the Parish of Orleans was also made a party defendant in the district court. He appealed the district court's decision and has filed a separate petition for certiorari.*

The Plaintiffs-Appellees below and Respondents herein are **Sojourner T.**, **Jane** and **Ida B.** on behalf of themselves and all others similarly situated; **James DeGueurce, M.D.**, **Calvin Jackson, M.D.**, and **Pamela Branning, M.D.**, on behalf of themselves and all others similarly situated, and their patients; **Hope Medical Group for Woman**; **Delta Women's Clinic West**; **Causeway Medical Suite**; **Emilia Bellone, M.S.W.**, on behalf of herself and her clients; **Reverend Kathleen Korb** and **Rabbi Michael Matuson**, on behalf of themselves and their congregants; and **Dr. Ifeanyi Charles Okpalobi**.

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TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTE & CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

A. Course of Proceedings and Disposition in the Court Below 2

B. Statement of the Facts 3

REASONS FOR GRANTING THE WRIT 6

PRELININARY STATEMENT

I. The Court Below Failed to Apply The Normal Standard for Facial Challenges, Which Must Be Applied in Cases Involving The Constitutional Right to Abortion 7

A. In a Facial Challenge to a Statute, the Plaintiff Has the Burden of Proving That No Application of the Statute Is Constitutional 7

B. The Normal Rule for a Facial Challenge Should Apply to Cases Involving Abortion ... 8

TABLE OF CONTENTS (continued)

Page(s)

1. The facial challenge rule is a general principle of law that should be applied in an even-handed, neutral fashion 9

2. Sound jurisprudential and practical reasons support principled adherence to the facial challenge rule 10

3. The lower court failed to apply facial challenge principles to the Louisiana Abortion Statute 11

II. The Court Should Grant Review to Consider the Right of the State of Louisiana to Re-Weigh the Interests of the Pregnant Woman and the Unborn Child 11

A. The Crucial Balancing in *Roe* of the Rights of the Pregnant Woman Against Only the Potential Life of the Unborn Child Was Wrong and Should Be Re-Examined 12

B. Principles of *Stare Decisis*, Properly Understood, Should Not Preclude Reconsideration of *Roe* and the Re-Balancing of the Competing Interests in the Abortion Decision 14

C. Louisiana's Determination That Actual Human Life Begins *In Utero* and Its Decision to Protect Such Life Accords With Modern Scientific Knowledge Available Since *Roe v. Wade* 17

TABLE OF CONTENTS (continued)

Page(s)

1. Modern developments in embryology and fetology establish the humanity of the unborn child 17

2. Ultrasound enables us to observe the humanity of the unborn child 18

3. There is evidence of fetal pain 20

D. Louisiana's Abortion Statute Is an Appropriate and Reasonable Exercise of Authority Reserved to the States by the U.S. Constitution 22

1. This Court has recognized other areas where States may legislate notwithstanding individual privacy rights . . 22

2. Louisiana's determination that actual human life begins *in utero* accords with the recognition of unborn human life in the law of most States 24-25

3. Louisiana's unique legal system has historically afforded legal protection to the unborn child 26

CONCLUSION 29

TABLE OF CONTENTS (continued)

APPENDICIES: **Page(s)**

A. OPINION AND JUDGMENT OF THE FIFTH CIRCUIT A-1

B. OPINION OF THE DISTRICT COURT REASONS FOR JUDGMENT A-13

C. JUDGMENT OF THE DISTRICT COURT .. A-17

D. ACT 26 OF THE 1991 LOUISIANA LEGISLATURE A-19

E. OPINION OF THE LOUISIANA ATTORNEY GENERAL A-24

F. LIST OF STATES RECOGNIZING THAT HUMAN LIFE BEGINS AT CONCEPTION . A-31

G. LIST OF STATES THAT TREAT THE KILLING OF AN UNBORN CHILD AS HOMICIDE A-63

H. AFFIDAVIT OF RAYMOND F. GASSER, Ph.D A-68

TABLE OF AUTHORITIES

CASES: **Page**

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 9

Barnes v. Moore, 970 F. 2d 12 (5th Cir. 1992), *cert. denied*, Dec. 7, 1992, 61 U.S.L.W. 3303 6

Booth v. Maryland, 482 U.S. 496 (1987) 15,16

Bowers v. Hardwick, 478 U.S. 186 (1986) 24

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) 15

Byrn v. New York, 31 N.Y.2d 194 (1992) appeal dismissed 410 U.S. 949 (1973) 13

Connecticut v. Menillo, 423 U.S. 9 (1975) 8,10

Danos v. St. Pierre, 402 So.2d 633 (La. 1981) 28

Guam Society of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366 (9th Cir. 1992); *cert. denied*, 61 U.S.L.W. 3399 (U.S. Nov. 30, 1992) 5

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CASES: **Page**

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984) 8,9

Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333 (1989) 24

National Metropolitan Bank v. U.S., 323 U.S. 454 (1945) 4

Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990) 9

Ifeanyi C. Okpalobi v. State of Louisiana, et al, No. 91-2422 (E.D. La. July 3, 1991) 3

Payne v. Tennessee, 111 S.Ct. 2597 (1991) 14,15,16

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992) . . . . . passim

Reynolds v. United States, 98 U.S. 145 (1879) 23

Roe v. Wade, 410 U.S. 113 (1973) . . . . . passim

Rust v. Sullivan, 111 S.Ct. 1759, 1767 (1991) 5,10

Schall v. Martin, 467 U.S. 253, 269 n. 19 (1984) 11

TABLE OF AUTHORITIES (continued)

CASES: **Page**

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Sojourner T. v. Edwards, 974 F. 2d 27 (5th Cir. 1992) . . . . . passim

Sojourner T. v. Roemer, 772 F. Supp. 930 (E.D. La. 1991) . . . . . passim

United States v. Salerno, 481 U.S. 739, 745 (1987) . 8,9,10

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 7,8,9,10

STATUTES:

U.S. Const. amend. XIV, §1 2

First Amendment, U.S. Constitution 10

Tenth Amendment, U.S. Constitution 2,6,22

Fourteenth Amendment, U.S. Constitution 13,27

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 1

28 U.S.C. 1343(a)(3) 1

28 U.S.C. 1343(a)(4) 1

42 U.S.C. §1983 1

TABLE OF AUTHORITIES (continued)

Page

STATUTES:

Federal Rules of Civil Procedure 12(c) 2,3

Louisiana Abortion Statute . . . . . passim

La. Acts, 1855, Act 120, §24, p. 132 27

Act 26 of the 1991 Louisiana Legislature 2,3,4

La. Rev. Stat. §9:121 28

La. Rev. Stat. §9:123 28

La. Rev. Stat. §9:124 28

La. Rev. Stat. §9:125 28

La. Rev. Stat. §14:87 4,27

La. Civil Code Article 26 27

La. Civil Code Article 90, comment (b) 23

La. Civil Code Article 900 23

La. Civil Code Article 901 23

TABLE OF AUTHORITIES (continued)

Page

La. Civil Code Article 954 27

La. Civil Code Article 1474 27

La. Civil Code Article 1476 13

La. Civil Code Article 1918 13

La. Civil Code Article 2315 28

La. Civil Code Article 2315.2(A) 28

La. Code of Civil Proc. art. 683 13

La. Code of Civil Proc. art. 732 13

TABLE OF AUTHORITIES (continued)

Page

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American College of Obstetricians & Gynecologists Technical Bulletin number 116 - May 1988 19

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Page

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Op. Att'y Gen. No. 91-419 (La. Aug. 23, 1991) 4,5

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Siete Partidas, Part VII, Title XXXIII, Law VIII 27

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Supreme Court of the United States
October Term, 1992

EDWIN W. EDWARDS, *et al., Petitioners,*

v.

SOJOURNER T., *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Edwin W. Edwards, Governor of the State of Louisiana, and Richard P. Ieyoub, Attorney General of the State of Louisiana, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Sojourner T. v. Edwards,* 974 F.2d 27 (5th Cir. 1992).

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is reported at 974 F.2d 27 (5th Cir. 1992). They are reprinted in the appendix hereto, p. A-1, *infra.*

The decision and judgment of the United States District Court for the Eastern District of Louisiana is reported at 772 F.Supp. 930 (E.D. La. 1991). They are reprinted in the appendix hereto, p. A-13 and p. A-17 respectively, *infra.*

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343 (a)(3), and 1343(a)(4), Plaintiffs-

Respondents brought this suit in the Eastern District of Louisiana. On August 7, 1991, the district court, pursuant to Federal Rule of Civil Procedure 12(c), granted Plaintiffs' Motion for Judgment on the Pleadings. *See* p. A-13, *infra.*

Defendants-Petitioners appealed. On September 22, 1992, the Fifth Circuit entered judgment affirming the decision of the district court. *See* p. A-11, *infra.* No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE & CONSTITUTIONAL PROVISIONS

This case concerns Act 26 of the 1991 Louisiana Legislature, the Louisiana Abortion Statute, which appears at A-19, *infra.* The relevant portion of the Due Process Clause of the Fourteenth Amendment is "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, §1. The Tenth Amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Const. Amend. X.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

On June 18, 1991, Plaintiffs Sojourner T., *et al.,* brought suit in the district court challenging the Louisiana Abortion Statute under the Due Process Clause of the Fourteenth Amendment as interpreted by *Roe v. Wade,* 410 U.S. 113 (1973), and other constitutional theories and requesting declaratory and injunctive relief. *Sojourner T. v. Roemer,* 772 F. Supp. 930 (E.D. La. 1991). On July 3, 1991, Dr. Ifeanyi Charles Okpalobi also challenged the Louisiana

Abortion Statute under *Roe v. Wade* and other constitutional theories seeking declaratory and injunctive relief. *Ifeanyi C. Okpalobi v. State of Louisiana, Sojourner T. v. Roemer,* 772 F. Supp. 930 (E.D. La. 1991). The district court consolidated the cases. Both cases present solely facial challenges because the statute was enjoined before its effective date.

At the request of the district judge, cross motions for judgment on the pleadings were filed along with extensive supporting memoranda.[1] On August 7, 1991, the district court, pursuant to Federal Rule of Civil Procedure 12(c), determined that there was "no factual issue which could change the result" and granted plaintiffs' Motion for Judgment on the Pleadings, declared the Statute unconstitutional and enjoined its enforcement. *See* p. A-13, *infra.* The court declined to reach other constitutional issues raised by Plaintiffs, "because under the *Roe* decision they cannot make any difference in the result." *See* p. A-16, *infra.*

The Notice of Appeal was filed on August 8, 1991. The case was docketed August 14, 1991, in the Fifth Circuit. The case was argued and submitted on February 6, 1992, and on September 22, 1992, the Fifth Circuit affirmed the judgment of the district court, citing particularly *Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992). See* A-1, *infra.*

B. Statement of the Facts[2]

The Louisiana Abortion Statute, Act 26 of the 1991 Louisiana Legislature, *see* p. A-19, *infra,* was passed over

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[1] Because Rule 12(c) provides that a Motion for Judgment on the Pleadings will be converted into a motion for summary judgment if necessary, petitioners filed extensive affidavits in the record detailing fetal development and discussing the anticipated implementation of the Abortion Statute.

[2] The facts of this case are those facts asserted in the Amended Complaint which are admitted in the Answer and those "well pleaded factual allegations in the adversary's pleadings." C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2nd* § 1368 (1990) ("Practice Under Rule

the veto of the Governor on June 18, 1991. It amends and reenacts LSA-R.S. 14:87, and would have gone into effect September 6, 1991. The Act makes it a crime to "administer[ ] or prescribe[ ] any drug, potion, medicine, or any other substance to a female" or to "use[ ] any instrument or external force whatsoever on a female" "with the specific intent of terminating a pregnancy." *See* p. A-20, *infra.* The Act provides exceptions for the termination of pregnancy (1) "to preserve the life or health of the unborn child or to remove a dead unborn child;" or (2) to "save the life of the mother;" or (3) when the "pregnancy is the result of rape;" or (4) when the "pregnancy . . . is the result of incest." *See* p. A-20, *infra.* Before an abortion can be performed under the rape and incest exceptions, certain reporting requirements must be met. *See* p. A-20, *infra.* Also, abortions for reasons of rape and incest must be performed prior to the thirteenth week after conception. *See* p. A-21, *infra.* No criminal liability attaches to a woman upon whom an abortion is performed.

The Louisiana Statute includes a specific finding that human life begins at conception, but the statute extends the protection of the criminal law only from the onset of pregnancy. Because of questions raised about the applicability of the Statute to the use of contraceptives and the practice of *in vitro* fertilization, the Louisiana Attorney General issued an advisory opinion, set forth in the appendix E hereto, providing an authoritative interpretation of the Statute:

> It is the opinion of this office that LSA-R.S. 14:87, which prohibits abortions except in specific

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(footnote 2 continued)

12(c)"). Because the district court granted the Plaintiffs'-Respondents' Motion for Judgment on the Pleadings, under Rule 12(c), the well pleaded factual assertions of the Defendants'-Petitioners' Answer "are assumed to be true and all contravening assertions in the movant's [Plaintiffs'-Respondents'] pleadings are taken to be false." Wright & Miller, *Federal Practice and Procedure: Civil 2nd* § 1368. *See also National Metropolitan Bank v. United States,* 323 U.S. 454 (1945).

> circumstances, does not prohibit authorized and license[d] medical personnel from prescribing, or administering medicines, drugs, potions, substances or instruments that operate to prevent pregency rather than to terminate pregnancy. Because IUD's, oral contraceptives and "the morning-after-pill" prevent rather than terminate pregnancy, their use is not made illegal by LSA-R.S. 14:87; nor is the process of in vitro fertilization subject to Act 26 until subsequent to the implantation of a fertilized ovum in a female's uterus.

Op. Att'y Gen. No. 91-419 (La. Aug. 23, 1991), p. A-24, *infra*.[3]

The facts reveal the following about the Plaintiffs. Plaintiff Sojourner T. is pregnant. Plaintiff James DeGueurce, M.D., performs abortions in Louisiana during the first and second trimesters of pregnency. Plaintiff Calvin Jackson, M.D., performs abortions in Louisiana up to fifteen weeks gestational age. Plaintiff Pamela Branning, M.D., performs abortions in Louisiana. Plaintiff Hope Medical Group for Women provides abortions in Louisiana up to 22 weeks gestational age. Plaintiff Delta Women's Clinic West provides abortions in Louisiana up to 22 weeks of gestation. Plaintiff Causeway Medical Suite provides abortions in Louisiana up to 22 weeks gestational age. The medical Plaintiffs above perform abortions not falling within the exception for saving the life of the mother. Plaintiff Dr. Ifeanyi Charles Okpalobi performs abortions in Louisiana.

According to Plaintiffs' complaint (Paragraph 31), over 17,000 abortions were performed in 1988 in Louisiana and a comparable number of women would obtain abor-

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[3] Because this is a facial challenge, the standard of review announced by this Court in *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991), is applicable. Alleged application of the Louisiana Abortion Statute to contraception or *in vitro* fertilization is outside the scope of this facial challenge because the statute clearly is designed to regulate abortion.

tions in 1991. Later term abortions are more dangerous than earlier term abortions. The Louisiana Abortion Statute provides for and encourages rape victims to seek medical attention promptly for the purposes, inter alia, of preventing pregnancy and venereal disease.

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT

Petitioners recognize that the Court recently denied the petition for certiorari of the Territory of Guam. Petitioners submit, however, that because of Louisiana's status as a state and the assurances of the Tenth Amendment, and because of the importance of clarifying what the facial challenge rule is in abortion litigation, their petition should be granted.

Since the Court denied the Guam application, it has denied the plaintiffs' petition for certiorari in *Barnes v. Moore,* 970 F. 2d 12 (5th Cir. 1992), *cert. denied,* Dec. 7, 1992, 61 U.S.L.W. 3303, in which plaintiffs challenged Mississippi's Informed Consent to Abortion law. In *Barnes,* the Fifth Circuit clearly and forcefully applied the facial challenge rule and upheld the constitutionality of the statute. This Court refused to review its decision. In denying Guam's application, the Court refused to consider the adequacy of plaintiff's facial challenge to the Guam statute, although Guam contended that there were at least some post-viability applications of its statute that would be constitutional. In *Sojourner T.,* the courts below completely failed to apply a facial challenge analysis. This Court should accept Louisiana's petition to consider when and how the facial challenge rule applies in abortion litigation.

In 1988 there were more than 1700 abortions performed in Louisiana.[4] Because Louisiana's Statute was enjoined before its effective date there is no reason to believe there were fewer abortions in 1991 and 1992. Some of the

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[4] See page5, *supra.*

plaintiffs herein are physicians who in their complaint admit to performing abortions up to 22 weeks gestational age.[5] Especially in view of the four week margin of error for determining viability found to exist in *Webster,* abortions after viability are performed in Louisiana.[6]

The Court should remand this case to determine if there is any constitutional application of Louisiana's Statute and whether the authority to protect unborn human life is reserved to the State of Louisiana. For these reasons and as explained below the Court should accept Louisiana's petition for certiorari.

I. The Court Below Failed to Apply the Normal Standard for Facial Challenges, Which Must Be Applied in Cases Involving the Constitutional Right to Abortion.

Under the facial challenge rule, clearly and forcefully articulated by this Court, the Court of Appeals should have considered whether the Louisiana Abortion Statute had any Constitutional applications.[7] If so, the Statute should have been upheld against a facial challenge.

A. In a Facial Challenge to a Statute, the Plaintiff Has the Burden of Proving That No Application of the Statute Is Constitutional.

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[5] See page 5, *supra.*

[6] *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 3055, 3057 (1989). In *Webster* the Court essentially upheld a provision of Missouri's statute which created a presumption of viability at twenty weeks by recognizing that there is a four week margin of error in estimating gestational age.

[7] The facial challenge issue was raised before the District Court. Memorandum in Support of Motion for Judgment on the Pleadings at 1, *Sojourner T. v. Roemer,* 772 F. Supp. 930 (E.D. La. 1992) ("[T]he standard of review to be applied must be that used for a facial challenge."). The facial challenge issue was also raised before the Court of Appeals. Brief for Appellants Roemer and Guste at 1, *Sojourner T. v. Edwards,* 974 F.2d 27 (5th Cir. 1992) ("This is a facial challenge to a statute not yet effective. The standard of review for a facial challenge is whether any circumstance exists under which the Act would be valid.").

Plaintiffs challenged the Louisiana Abortion Statute on its face. As Justice O'Connor explained in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), a facial challenge requires plaintiffs to show that " 'no set of circumstances exists under which the Act would be valid.' " *Webster,* 492 U.S. at 524 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)).

It is not sufficient in a facial challenge for plaintiffs to demonstrate that a challenged act "might operate unconstitutionally under some conceivable set of circumstances." *Id.,* quoting *Salerno.* Plaintiffs must demonstrate that a challenged law is "unconstitutional in every conceivable application." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 796 (1984). The burden of proof on this point is clearly upon the plaintiffs.

B. The Normal Rule for a Facial Challenge Should Apply to Cases Involving Abortion.

Procedural rules and principles of adjudication including the rule for a facial challenge should be applied in a neutral manner. A challenge to a State's abortion statute should enjoy no special status. In the present case, however, the lower court ignored the direct applicability of the facial challenge rule.

It is noteworthy that where the normal rules of procedure have been applied, abortion regulation by the states has generally been upheld. For example, in *Connecticut v. Menillo,* 423 U.S. 9 (1975), an abortionist with no medical training was prosecuted under a statute which made criminal the performance of an abortion by "any person." *Id.* at 10. As the statute was challenged in the criminal proceedings, the state supreme court struck down the statute on its face on the basis of *Roe v. Wade.* This Court vacated the decision and remanded the case with instructions to reconsider the case as an applied challenge, noting that the statute had a constitutional application to non-physicians, even though in all other respects it might conflict with *Roe.*

The principle of *stare decisis* has been a guiding principle of this Court throughout its history, although with lesser force in constitutional cases. *Webster*, 492 U.S. at 490 (Rehnquist, C.J., joined by White and Kennedy, JJ.) (plurality opinion).

This Court has recently placed great reliance on the doctrine of *stare decisis* in the abortion context in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). *See also Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983) (relying explicitly on the doctrine of *stare decisis* to reaffirm *Roe*).

Unlike the limited application of *stare decisis* in constitutional cases, the principle applies with full force to decisions setting forth adjudication principles, such as the facial challenge rule. Decisions of this Court have clearly applied the facial challenge rule in the abortion context.

1. The facial challenge rule is a general principle of law that should be applied in an even-handed, neutral fashion.

The facial challenge rule is a rule of general applicability and should be applied in an even-handed, neutral fashion. It has been so applied in non-abortion contexts. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The facial challenge rule has also been applied in the abortion context. It was applied in *Webster* to uphold provisions of the Missouri abortion law at issue. *Webster*, 492 U.S. at 506-07 (plurality opinion). Justice O'Connor, in *Webster*, relied on the facial challenge doctrine to uphold Missouri's ban on the utilization of public facilities and participation of public employees in the performance of abortions not necessary to save the life of the mother. *Id.* at 524 (O'Connor, J., concurring in part and concurring in the judgment).

Justice Kennedy, in *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), relied on the

facial challenge rule to uphold Minnesota's parental notification statute. *Id.* at 2981. Similarly Justices O'Connor, Kennedy, and Souter, in the *Casey* joint opinion, relied on the facial challenge rule in upholding Pennsylvania's 24-hour waiting period for women seeking abortions after they were offered what Pennsylvania considered to be information necessary for an informed consent. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 112 S. Ct. at 2826. *See also Connecticut v. Menillo,* 423 U.S. 9 (1975) and *Rust v. Sullivan,* 111 S.Ct. 1759 (1991).

2. Sound jurisprudential and practical reasons support principled adherence to the facial challenge rule.

There are sound reasons for the facial challenge rule. Foremost among them is avoidance of deciding hypothetical cases. The concreteness which a case achieves through application of law to real facts not only allows for better decisions as a practical matter, it also more closely comports with the constitutional requirement that there be a case or controversy for federal jurisdiction.

This principle was recently applied in *Webster v. Reproductive Health Services,* 492 U.S. 490, wherein this Court declined to review the preamble to the Missouri abortion law—which declared that "the life of each human being begins at conception"—until the preamble was "applied to restrict the activities of the appellees in some concrete way." *Id.* at 506.

Historically, a facial challenge succeeds only when all possible applications of a law are unconstitutional and the burden is on the plaintiff to prove that result. Only in the area of First Amendment free speech—where a chill on a constitutionally super-protected right must be avoided—has this Court recognized an overbreadth doctrine which allows a statute to be struck down as unconstitutional if it has constitutional and unconstitutional applications. The overbreadth doctrine, however, is not recognized outside the limited context of the First Amendment. *Salerno,*

481 U.S. at 745; *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984).

In the area of abortion, no less than in any other non-speech area of constitutional law, the concreteness provided by actual application of the law is necessary.

3. The lower court failed to apply facial challenge principles to the Louisiana Abortion Statute.

The lower court erred by not considering whether there are any possible constitutional applications of the Louisiana Abortion Statute. The proper question is *not* whether the Louisiana Abortion Statute would *ever* impose an "undue burden" upon a woman seeking an abortion, but whether it *always* would. The facial challenge rule requires that the latter test be met, but the facial challenge test was never applied by the lower courts. Nowhere in the present case have the plaintiffs met their burden of proving that the Louisiana Abortion Statute has no constitutional applications. Plaintiffs neither alleged nor attempted to prove that Louisiana's Abortion Statute has no possible constitutioanl applications.

The lower courts should have considered, for example, whether the Louisiana Abortion Statute might be applied after viability, to cases where abortions are sought for reasons of the unborn child's gender or race or are performed for the purpose of harvesting fetal body parts for transplantation experiments. Clearly, because there are some applications that do not impose an undue burden on women, the Louisiana Abortion Statute should not have been declared unconstitutional in its entirety. The lower court erred both in analysis and outcome.

II. The Court Should Grant Review to Consider the Right of the State of Louisiana to Re-Weigh the Interests of the Pregnant Woman and the Unborn Child.

A. The Crucial Balancing in *Roe* of the Rights of the Pregnant Woman Against Only the Potential Life of the Unborn Child Was Wrong and Should Be Re-Examined.

A fundamental flaw of *Roe* is its undervaluation of a State's interest in protecting unborn human life. According to *Roe,* a State's interest is only the protection of *potential* human life, an interest less compelling than the protection of *actual* human life. The result is that when the State's interest, declared by *Roe* to be less than compelling, is measured against the pregnant woman's purportedly fundamental right, the woman's right normally outweighs the State's interest prior to viability.

As Justice Scalia pointed out in his dissenting and concurring opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 112 S.Ct. at 2875, the *Roe* Court begged the question of whether the State's interest was limited to the protection of merely potential human life. Rather than answering the question of when human life begins or deferring to the States' determination, the *Roe* Court simply assumed that the unborn child is merely a potential human life. According the unborn child the status of potential life was presented as a concession, but it was really a devaluation. The Court bolstered its *position* with three propositions, none of which supports *Roe*'s conclusion.

The first, apparently intended as a concession to the States, is that "as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone." *Roe v. Wade,* 410 U.S. at 150. From this concession that what the pregnant woman carries within her is *at least* potential life, *Roe* apparently concludes that what the pregnant woman carries within her is *at most* potential life. It is not logical to equate "at least" with "at most," yet that is what *Roe* does.

The second proposition *Roe* uses to bolster its conclusion that the unborn child is only potential life is that the unborn are not "persons" as that term is used in the

Fourteenth Amendment. *See* 410 U.S. at 157-58. However, the most that can be drawn from this proposition is that the Fourteenth Amendment does not invalidate state laws *allowing* abortion (because the Fourteenth Amendment does not guarantee to the unborn the right to life). *See Byrn v. New York*, 31 N.Y.2d 194 (1972), *appeal dismissed* 410 U.S. 949 (1973). It does not follow that the Fourteenth Amendment invalidates state laws *proscribing* abortion. Further, to draw from this proposition the conclusion that a fetus is merely potential human life is to assume that the Fourteenth Amendment is the only possible source of rights the unborn can have. In other words, to say that the Fourteenth Amendment does not guarantee a right is not to say that the right does not exist at all.

The third proposition *Roe* uses to support its conclusion is that in areas other than abortion, the unborn do not have the same rights as persons already born live, and whatever other rights the unborn have are often contingent on live birth. *See* 410 U.S. at 161-62. But it does not follow from this that an unborn child is not a human life worthy of State protection. If it did, then it could be argued that the lives of minor children are less worthy of protection by the State, because minors' legal rights are often less than those of persons of majority age.[8] Certainly not all persons enjoy every right, but a non-person has no rights.

To sum up: *Roe*'s conclusion that the State's countervailing interest is in the protection of merely potential human life, rather than actual human life, is not supported by logic. As will be shown below, there are compelling reasons for a State to conclude that the unborn child is an actual human life, not merely a potential human life. This Court should grant a writ of certiorari so there can be a re-balancing of the competing interests of the pregnant

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[8] There are many examples of this under Louisiana law. Minors generally do not have the capacity to contract, or to make a will or an *inter vivos* donation. La. Civ. Code arts. 1918 and 1476. Nor do minors have the legal capacity to sue or be sued in civil actions. La. Code of Civ. Proc. arts. 683 and 732.

woman and the unborn child, without *Roe*'s thumb on the scales.

B. Principles of *Stare Decisis,* Properly Understood, Should Not Preclude Reconsideration of *Roe* and The Re-Balancing of the Competing Interests in the Abortion Decision.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 112 S. Ct. 2791 (1992), this Court reaffirmed the "essential holding" of *Roe v. Wade.* Though Justices O'Connor, Kennedy and Souter expressed some doubts about the correctness of *Roe*, they apparently believed that the doctrine of *stare decisis* required them to put aside their doubts.[9]

The joint opinion in *Casey* misconstrued the doctrine of *stare decisis.* A proper understanding and application of the doctrine leads to the conclusion that this Court should reconsider *Roe.*

Recently in *Payne v. Tennessee,* 111 S.Ct. 2597 (1991), this Court summarized the accepted view of *stare decisis:*

> Adhering to precedent "is usually the wise policy, because in most matters it is more important that

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[9] *See, e.g.,* 112 S.Ct. at 2808 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis.*"); 2812 ("Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal relunctance any of us may have, not for overruling it."); 2817 ("We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and ... we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.").

> the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed.815 (1932) (Brandeis, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Smith v. Allwright*, 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944). *Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co., supra*, 285 U.S., at 407, 52 S.Ct., at 447 (Brandeis, J., dissenting).

111 S.Ct. at 2609-10. In his concurring opinion in *Payne*, Justice Scalia, joined by Justices O'Connor and Kennedy, explained the reasons behind the doctrine of *stare decisis*. Though Justice Scalia was speaking of *Booth v. Maryland*, 482 U.S. 496 (1987), which this Court overruled in *Payne*, his statements apply equally to *Roe v. Wade*:

> [*Stare decisis*], to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that settled practices and expectations of a democratic society should generally not be distrubed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well. A decision of this Court which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less than an explicit

> overruling, should be approached with great caution. It was, I suggest, *Booth*, and not today's decision, that compromised the fundamental values underlying the doctrine of *stare decisis*.

Payne, 111 S.Ct. at 2614 (Scalia, J., concurring).

Application of the majority opinion in *Payne*, and of Justice Scalia's concurrence, leads to the conclusion that this Court should revisit *Roe* to decide what it did not decide in *Casey*, namely whether *Roe* was decided correctly in the first place. *Roe* was a constitutional decision. Hence, the normal doctrine of "more important that the law be settled than it be settled correctly" does not apply. On the contrary, because legislative correction of *Roe* is virtually impossible, this Court should not avoid reconsidering the correctness of *Roe*. This is particularly so where, as shown in *Casey*, four justices plainly believe *Roe* was wrongly decided and three more have intimated that it was.[10]

Another reason this Court should re-examine *Roe* is that *Roe* was the kind of decision Justice Scalia, joined by Justices O'Connor and Kennedy, spoke of in his concurrence in *Payne* quoted above. Though *Roe* did not overrule prior case law, it "announce[d] a novel rule, contrary to long and unchallenged practice, and pronounce[d] it to be the Law of the Land ...." That novel rule, of course, was that States may not proscribe abortion, at least not before viability. In doing so, *Roe* outlawed a "long and unchallenged practice" of a majority of the States in proscribing abortions.[11] Thus, *Roe* itself "compromised the fundamental values underlying the doctrine of *stare decisis*," that "the settled practices and expectations of a democratic society should generally not be disturbed by the courts." *Payne*, 111 S.Ct. at 2614 (Scalia, J.,

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[10] See n. 9, *supra*.

[11] *See Roe v. Wade*, 410 U.S. at 118 n.2 (citing statutes from 30 States proscribing abortion except those performed for the purpose of saving the mother's life).

concurring).

This Court should not shy away from reconsidering a wrong constitutional decision under the incorrect belief that *stare decisis* prevents this Court from doing so, particularly when that decision itself violated the fundamental principles underlying the doctrine of *stare decisis*. This Court should grant this writ of certiorari to answer the question left unanswered by *Casey*, namely, whether *Roe* was correctly decided in the first place.

C. Louisiana's Determination That Actual Human Life Begins *In Utero* and Its Decision to Protect Such Life Accords With Modern Scientific Knowledge Available Since *Roe v. Wade*.

1. Modern developments in embryology and fetology establish the humanity of the unborn child.

In 1973, when *Roe v. Wade* was decided, the unborn child was a veritable stranger to the scientific and medical community. Only since 1973 have new techniques permitted scientists to know and observe what is occurring *in utero* as the human being develops from conception to birth.[12] Biological advances now permit the scientific investigator to look at a human's building blocks to determine not only what happens at a molecular level, but also when it happens.[13] New technology in ultrasound and real time ultrasound allows visualization of the unborn child *in utero* with such superb clarity that diagnosis and treatment of fetal disorders that were not even recognized to

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[12] Harrison, "The Fetus as a Patient: Historical Perspective" in *The Unborn Patient* 3 (M. Harrison, M. Golbus & R. Filly eds. 2nd ed. 1991).

[13] For a listing of the many biological technological advances and discoveries that have revolutionized man's knowledge of the developing human being, see Boehm & Kazazian, "Prenatal Diagnosis by DNA Analysis" in *The Unborn Patient* 82 (M. Harrison, M. Golbus & R. Filly eds. 2nd ed. 1991).

exist in 1973 can now be successfully performed.[14]

The very creation of a new medical subspecialty of maternal-fetal medicine attests to the great leap of knowledge as respects the unborn child over the last two decades. As technology continues to evolve, the capabilities of science and medicine have increased. Physicians are improving the quality of unborn patient care on an almost daily basis and in the process increasing and improving their knowledge of the humanity of the unborn child.

2. Ultrasound enables us to observe the humanity of the unborn child.

Today, in stark contrast to 1973, there is no serious dispute or lack of scientific consensus that unborn children are human beings. Individual human life begins at conception. Scientists accept this statement as scientific fact, physicians accept it as medical fact, and pregnant women accept it as a natural fact.

With the marvelous technological advances in ultrasound and *in utero* photography during the last decade, the visual proof of the humanity of the unborn child is available for all to see. Ultrasounds are routinely performed in obstetrical offices every day, permitting physicians and parents alike to witness the facts of growth and development of that distinctly unique and separate human

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[14] Two physicians from the Fetal Treatment Program and the Department of Surgery, University of California, San Francisco, California recently wrote about the fetus as a patient. They stated:

> Prenatal diagnosis has undergone an explosion of growth in the last decade. The primary impetus for this rapid expansion has come from the widespread use of prenatal ultrasonography. After the first reports of *in utero* ultrasonographic diagnosis of congenital anomalies in the 1970s, increasingly sophisticated equipment and experience in interpretation led to the accurate prenatal diagnosis of a growing number of surgical lesions. Harrison & Adzick, "The Fetus as a Patient" 213 *Ann. Sur.* 279 (1991).

individual present within the womb.[15]

Fact: After the union of the sperm and the ovum there is a cell formed that is a living, genetically unique and distinctly human individual. During the first week of life, this new individual journeys down the fallopian tube to reach the uterus where it attaches to the uterine wall.

Fact: In the third week the heart forms and begins to beat. Before the end of the first month after conception, beginnings of the mouth, brain, heart, gut and limbs can be identified.

Fact: There is electrical activity in the human brain six weeks after conception. By the end of the second month of life the face is distinctly human in appearance, there are ten fingers and ten toes and all the nerves and blood vessels are present. Ninety-nine percent of the muscles are also present.

Fact: By the end of the third month all organ systems of the body are present and functional. At five months there are distinct fingerprints on the digits. During the last two months of pregnancy the unborn baby attains his or her birth size and prepares for life outside the uterus.

The moment the individual is outside the uterus, he or she converts in name only from a fetus to a newborn. Fact: That fetus/newborn has the same unique, living, feeling body before birth as after birth, regardless of whether he or she was inside the uterus for only three months or as

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[15] Today, between 60% and 100% of mothers in North America, Great Britain and Western Europe have a sonographic examination during pregnancy. *See* Johnson & Toi, "Overview of Obstetrical Sonography" in *Diagnostic Ultrasound*, Vol. 2 (C. Rumack, S. Wilson & J. Charboneau eds. 1991). Interestingly, it is noted in American College of Obstetricians & Gynecologists technical bulletin, number 116—May 1988 that obstetrical ultrasound has been in clinical use some 15 years. Fifteen years prior to 1988 was the year 1973, the year *Roe v. Wade* was decided. A.C.O.G. Technical Bulletin 116 (1988).

many as nine months.[16]

The *Roe* Court could not have known that society was on the verge of tremendously important technological advances and innovations as concerns the scientific truths about the humanity of the unborn child.

3. There is evidence of fetal pain.

Recent evidence also establishes that the human fetus perceives pain. Research done over the last few decades contradicts earlier studies which concluded that perception or localization of pain was not present in either the human fetus or newborn.

It is now clearly recognized that the neural pathways for pain may be traced from the sensory receptors in the skin to sensory areas in the cerebral cortex. These sensory receptors begin appearing around the mouth of the developing child in the seventh week of gestation and spread to the rest of the face, the palms of the hands and the soles of the feet by the eleventh week, to the trunk and parts of the arms and legs by the fifteenth week, and to all cutaneous and mucous surfaces by the twentieth week.[17] The development of neurotransmittors between the sensory fibers and interneurons in the dorsal horn of the spinal cord first appear during the sixth week of gestation.[18]

It was once believed that lack of myelination of the nervous system in premature and newborn babies rendered

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[16] The facts recited in the accompanying text are taken from the Affidavit of Raymond F. Gasser, Ph.D., included as part of the record in the district court and included herein as Appendix H.

[17] Anand & Hickey, "Pain and Its Effects in the Human Neonate and Fetus," 317 *New Eng. J. Med.* 1321, 1322 (1987); Flower, "Neuromaturation of the Human Fetus," 10 *J. Med. Phil.* 237, 242 (1988).

[18] Anand & Hickey, *supra*, at 1322; Flower, *supra*, at 242.

them incapable of pain perception. However, this has been scientifically proven false. First, even in adults, pain impulses are carried through unmyelinated and thinly myelinated fibers. Lack of myelinization merely means a slower conduction velocity in the nerves or central nerve tracts. This is offset completely by the shorter interneuron and neuromuscular distances traveled by the impulse.[19]

Moreover, quantitative neuroanatomical data has shown that the sensory nerve tracts that carry pain sensation undergo complete myelinization during the second and third trimesters of gestation.[20]

Electroencephalographs (EEG's) of the unborn and the newborn can now demonstrate the functional maturation of the cerebral cortex from about 20 weeks gestation to 27 weeks gestation. Well defined periods of quiet sleep, active sleep and wakefulness can be seen occurring *in utero* beginning at 28 weeks gestation.[21]

Additionally, physiological responses to painful stimuli, such as cardiorespiratory changes, have been documented in newborns of various gestational ages.[22] The unborn child is not only capable of experiencing pain, it does in fact feel pain. Behavioral changes associated with pain, including purposeful withdrawal of a limb and distinct facial expressions have been observed in very

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[19] *The Nervous System; Circuits of Communication in the Human Body* 109 (J. Clark ed.1985); Anand & Hickey, "Pain and Its Effects in the Human Neonate and Fetus," 317 *New Eng. J. Med.* 1321, 1322 (1987); Flower, "Neuromaturation of the Human Fetus," 10 *J. Med. Phil.* 237, 242 (1988). *See also* Scanlon, "Appreciating Neonatal Pain," 38 *Advanced Pediatrics* 317, 320 (1991).

[20] Anand & Hickey, *supra*, at 1322.

[21] Appendix H, affidavit of Raymond F. Gasser, Ph.D at p. 5.

[22] *See* Fletcher, "Pain in the Neonate," 317 *New Eng. J. Med.* 1321, 1347-1348 (1987).

premature newborns (less than 30 weeks gestation).[23]

Advances in the scientific arena have conclusively shown that the traditional view widely held in the early 1970's that the unborn (and the newborn) was not capable of experiencing pain and did not feel pain is wrong. Any view, indeed any decision, predicated in the least on the notion that the unborn child is insensitive to or immune from pain is outmoded and must be revisited and revised.

D. Louisiana's Abortion Statute Is an Appropriate and Reasonable Exercise of Authority Reserved to the States by the U. S. Constitution.

There are three reasons why Louisiana's Abortion Statute is an appropriate exercise of authority reserved to the States by the U.S. Constitution. First, the Constitution, including especially the Tenth Amendment, permits States to regulate and even to proscribe acts of individuals in other areas encompassed by the right to privacy recognized in *Roe*. There is no principled reason for regulation or proscriptioin of abortion to be treated differently. Second, Louisiana's recognition of the humanity of unborn children is consistent with the recognition of unborn human life accorded by the laws of most other States. Finally, Louisiana's protection of unborn human life is consistent with Louisiana's own unique civil law tradition, which from Roman times has proscribed abortion.

1. This Court has recognized other areas where States may legislate notwithstanding individual privacy rights.

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[23] Anand & Hickey, *supra*, at 1325; Flower, *supra*, at 242.

The *Roe* Court held that a pregnant woman's right to have an abortion was simply part of the right of privacy implied by the Constitution. 410 U.S. at 153. This right to privacy is said to extend "to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," areas "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy ...." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 112 S.Ct. at 2807. Yet in other areas encompassed by the right of privacy, this Court has recognized the States' right to regulate and in some cases to proscribe the "private" acts of individuals.

Consenting adults might make the intimate and personal decision to practice bigamy or polygamy. Yet this Court has held that the Constitution does not prevent government from proscribing bigamy or polygamy, even when polygamy is part of the exercise of one's religion. *Reynolds v. United States,* 98 U.S. 145 (1879).

Similarly, first cousins might make the intimate and personal decision to marry one another. Under the common law, first cousins could validly marry. 55 C.J.S. *Marriage* § 16, at 831 (1948). However, Louisiana, like many other States, prohibits such marriages. La. Civ. Code art. 90.[24] No court has ever held that such State interference in the intimate and personal decision of first cousins to marry violates the Constitution.[25]

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[24] First cousins are "[c]ollaterals within the fourth degree." *See* La. Civ. Code art. 90, comment (b); *see also id.,* arts. 900 and 901 (defining degrees as used to describe consanguinity).

[25] Today, if first cousins living in a State that proscribes their marrying one another want to marry, they have to travel to, and perhaps take up domicile in, a State that permits their marrying. Before *Roe v. Wade,* a woman living in a State that proscribed abortion who nonetheless wanted an abortion had to travel to a State that permitted abortion. If the former situation does not impermissibly burden the right to make a personal and intimate decision, then neither did the latter.

An adult homosexual might make the intimate and personal decision to commit sodomy with another adult homosexual, in the privacy of the home. Yet the intimate and personal character of such a choice did not stop this Court from permitting States to criminalize homosexual sodomy. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

A biological father of a child born of another man's wife might have a protected familial interest in developing a relationship with the child. Yet according to *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333 (1989), a State can deprive the biological father of the right to visit his child. Three of the dissenting justices in *Michael H. v. Gerald D.* admitted that a State could deprive the biological father of visitation rights if it were in the best interest of the child. *See* 491 U.S. at ____, 109 S.Ct. at 2359 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.).

It is ironic that this Court permits States to regulate and even to proscribe activity in these private areas, yet bars States from proscribing abortion. The State's interest in proscribing abortion is more compelling than its interest in proscribing activities in these other private areas. As *Roe* itself recognized, abortion involves the destruction of an embryo or fetus, and therefore is "inherently different" from other areas where the privacy of individuals is at stake. For this reason, "[t]he pregnant woman cannot be isolated in her privacy." *Roe*, 410 U.S. at 159.

In short, if States can constitutionally proscribe polygamy, marriage between first cousins, homosexual sodomy, and similar acts resulting from intimate and personal decisions, then there is no principled reason why States should not be able to proscribe abortion as well. If anything, because abortion results in the destruction of human embryonic or fetal life, States have a greater interest in proscribing it than they do in proscribing these other acts.

2. Louisiana's determination that actual

human life begins *in utero* accords with the recognition of unborn human life in the law of most states.

Louisiana is not alone in its recognition of the humanity of the unborn child. Thirty-nine states and the District of Columbia have recognized that human life begins at conception, and if it were not for this Court's holdings in *Roe* and *Casey* many of those states would accord legal protection to unborn human life.[26]

Nine states define by statute the killing of an unborn child to be a form of homicide, regardless of the stage of pregnancy. Six states declare that killing the unborn after quickening is homicide, and five more make killing after viability a form of homicide. New York's penal law punishes as homicide killing after 24 weeks of pregnancy.[27]

In upholding *Roe*'s factual finding that the unborn child is only potential human life, the Court acted without a full factual record and relied on scientific data predating its 1973 *Roe* decision. The Court's conclusion that the human embryo and fetus are not actual human life is at odds with the determination made by the great majority of state legislatures which have considered the humanity of the unborn and found that unborn human life is entitled to legal protection even if such protection cannot be said to be mandated by the United States Constitution.

The only official finding made by the United States Congress regarding the humanity of the unborn child was in a 1981 report of the Sub-Committee on the Separation of Powers, U.S. Senate Committee on the Judiciary, which found that as a matter of scientific fact that life begins at conception. The Committee found: "...today the facts are

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[26] See Appendix F, *infra*.

[27] See Appendix G, *infra*.

beyond dispute. Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being...."[28]

In view of scientific developments since 1973, the determination made by the great majority of state legislatures which were equipped to and did investigate the facts relating to the humanity of the unborn child, and the overwhelming importance of the issue to the country, the Court should consider anew the underlying scientific facts and the constitutional balancing of competing interests.

3. Louisiana's unique legal system has historically afforded legal protection to the unborn child.

The *Roe* Court believed that statutes proscribing abortion were a relatively recent phenomenon. *Roe*, 410 U.S. at 715. While that may or may not have been true in the other forty-nine states under their common-law tradition, it was not true in Louisiana, which has a civil law tradition unique in this Nation. Since Roman times, the civil law has recognized and protected the life of the unborn. Louisiana's Abortion Statute at issue here is a continuation of this venerable tradition. The depth of this tradition reflects the compelling nature of Louisiana's interest in protecting the life of the unborn.[29]

In the criminal arena, under Roman law, a woman who procured her own abortion was "punished as a Murderer." J. Domat, *The Civil Law in Its Natural Order*, Vol. I, Part I, Prel. Book I. Titl. 2, § 1, Law 6, p.138 (Strahan Transl. 1837). Similarly, Louisiana law before

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[28] Report on Human Life Bill, Sub-Committee on Separation of Powers, Committee on the Judiciary, United States Senate (97th Cong. 1st Sess. 1981) p. 7.

[29] Much of the following discussion is not original. Another appellant before the Court of Appeals in this case, District Attorney Harry Connick, set forth the history of the civil law's and Louisiana's recognition of the life and rights of the unborn in greater detail in his appellate brief.

1805 decreed the death penalty for all those, including the pregnant woman, who procured or performed the abortion of a living unborn child. The *Siete Partidas,* Part VII, Title XXXIII, Law VIII. In 1855, over ten years before the adoption of the Fourteenth Amendment, Louisiana enacted a strict abortion statute. Under this statute, anyone who administered or caused to be administered anything to a woman for the purpose of procuring an abortion or premature delivery was to be imprisoned at hard labor for between one and ten years. La. Acts, 1855, Act 120, § 24, p. 132. A successor of this statute was in effect at the time this Court decided *Roe v. Wade,* 410 U.S. at 118 n.2 (citing La. Rev. Stat. §14:87). Louisiana's current statute criminalizing abortion reflects a tradition with deep roots.

Likewise in the civil arena, the civil law that is Louisiana's unique legacy has recognized the life of unborn children and legal rights accruing to them. As far back as Roman times, those who were conceived but not yet born were accorded the right to inherit. J. Domat, *supra.* That tradition continues to this day, and is now reflected in Louisiana Civil Code articles 954 (governing intestate successions) and 1474 (governing testate successions). Article 26 of the Louisiana Civil Code embodies the same tradition:

> An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.

As long ago as 1923, a Louisiana court recognized a cause of action for the wrongful death of an unborn child, even though the child was not born alive. *Johnson v. South New Orleans Light & Traction Co.,* No. 9,048 (La. App. Orl. Cir. 1923), *writ denied,* No. 26,443 (La. 1942) (unreported

decisions). In the later case of *Danos v. St. Pierre,* 402 So.2d 633 (La. 1981) (on rehearing), the Louisiana Supreme Court approved of the *Johnson* court's ruling.

What is notable about Louisiana's providing a right to recover for the wrongful death of a stillborn child is that the right depends on the decedent having been *a person.* When *Danos* was decided, Louisiana Civil Code article 2315 permitted recovery for the wrongful death *of a person. Danos,* 402 So.2d at 637.[30] Defendants argued that the unborn were not persons, hence their death did not give rise to a cause of action for wrongful death. The *Danos* court evidently disagreed with this argument.[31]

Today, with the advent of *in vitro* fertilization, Louisiana has passed legislation to adapt its venerable and unique civil law tradition to new circumstances. La. Rev. Stat. §§ 9:121 *et seq.* This legislation recognizes that the *in vitro* fertilized ovum is a "juridical person," *id.* §§ 9:123, 124 and 125, with "certain rights granted by law," *id.* § 9:121. Though the legislation and the technology necessitating it are new, the reverence for and interest in protecting embryonic life reflected in the legislation are ancient.

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[30] Louisiana law is the same today. Louisiana Civil Code article 2315.2(A) provides, "If *a person* dies due to the fault of another, suit may be brought by [certain] persons to recover damages which they sustained as a result of the death ...."

[31] In *Roe*, this Court minimized the significance of state laws permitting parents of a stillborn child to recover for the child's wrongful death, under the belief that "[s]uch an action ... would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." *Roe*, 410 U.S. at 163. This is yet another area where *Roe*'s reasoning does not apply to Louisiana. As the preceding discussion makes clear, under Louisiana's civil law system, the existence of a cause of action for the wrongful death of a stillborn child depends on the child's having been a person while *in utero.* This is *inconsistent* with *Roe*'s view "that the fetus, at most, represents only the potentiality of life." 410 U.S. at 163.

One of the cornerstones of *Roe* was the idea that abortion statutes were relatively new, and thus not accorded the weight of tradition. Regardless of whether this idea was true as to the other forty-nine states, it is not true as to Louisiana. Louisiana's unique legal system, rooted in Roman law, reflects this State's ancient, compelling, and perhaps uniquely strong interest in protecting embryonic and fetal life.

CONCLUSION

In his Reasons for Judgment District Judge Duplantier said he regretted that he was compelled to follow the *Roe* majority and not Justice White's dissent wherein Justice White expressed his dismay that the Supreme Court could peremptorily strike down the existing abortion statutes of most states. Justice White decried the effect of *Roe* in these terms:

> "The upshot is that the people and the legislatures of fifty states are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the othe hand." *Roe v. Wade,* 410 U.S. at 223.

See, Appendix A-14.

In his special concurrence to the Fifth Circuit's affirmation, Judge Garza expressed his concern over *Casey.* He felt compelled to follow *Roe* and *Casey,* but he made his opinion very clear:

> Because a decision to permit or proscribe abortion is a political choice, I would allow the people of the state of Louisiana to decide this issue for themselves.

Twenty years have passed since *Roe* was decided in 1973. Millions of unborn lives have been lost. The decisions of countless state legislatures have been swept aside because of the Court's adherence to *Roe.* The United States Constitution establishes that in our republican form of government important policy decisions such as who will

live and who will die, when and under what circumstances, should be made by the elected representatives of the people acting through their legislatures and the Congress. We respectfully ask that *Roe* be reconsidered, and in that reconsideration that proper deference be given to the role of the states in our constitutional system.

For the reasons set out in Section I, this Petition should be granted to decide that the facial challenge rule applies in abortion cases, and the case should be remanded to determine the constitutional applications of the Louisiana Abortion Statute.

For the reasons set out in Section II, the Court should reconsider its decision in *Roe v. Wade,* and recognize the State of Louisiana's right to consider the competing interests of the pregnant woman and the unborn child.

Respectfully submitted,

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December 18, 1992.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3677

FILED
SEP 22 1992

SOJOURNER T, on Behalf of Herself and All Others Similarly Situated, ET AL.,

Plaintiffs-Appellees,

versus

EDWIN W. EDWARDS, As Governor of the State of Louisiana, ET AL.,

Defendants-Appellants.

****

DR. IFEANYI CHARLES OKPALOBI,

Plaintiff-Appellee,

versus

RICHARD P. IEYOUB, Attorney General of the State of Louisiana, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

---

Before JOLLY, and EMILIO M. GARZA, Circuit Judges, and SHAW, District Judge.*

E. GRADY JOLLY, Circuit Judge:

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*Chief Judge of the United States District Court of the Western District of Louisiana, sitting by designation.

This suit challenges the Louisiana Abortion Statute, which criminalizes performing abortions except under very limited circumstances. In the district court, the plaintiffs argued that the Statute is preempted by federal law, that the Statute is unconstitutional under *Roe v. Wade,* 410 U.S. 113 (1973), that the Statute is unconstitutional under *Griswold v. Connecticut,* 381 U.S. 479 (1965), and that the Statute is void for vagueness. The state of Louisiana defended the Statute arguing that *Roe v. Wade* has been overruled *sub silentio* by *Webster v. Reproductive Health Services,* 109 S.Ct. 3040 (1989), and its progeny. The district court struck down the Statute, holding that because *Roe v. Wade* is still good law, the Statute is unconstitutional.

The same arguments are presented to us that were made in the district court. After this case was argued before us, the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 60 U.S.L.W. 4795, Nos. 91-744 & 91-902 (June 29, 1992), reaffirmed the essential holding of *Roe v. Wade.* Because the Louisiana statute is clearly unconstitutional under *Casey,* we affirm the district court's order.

I

Sojourner T., et al., brought this suit in federal district court challenging the Louisiana Abortion Statute. They argued that the statute is preempted by the Food, Drug and Cosmetic Act[1] and by FDA regulations approving the use of certain contraceptives. They also argued that the statute violates the Commerce Clause and that it is unconstitutional under *Roe v. Wade* and *Griswold v. Connecticut.* They requested declaratory and injunctive relief.

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[1] 21 U.S.C. § 360K (1988).

Dr. Okpalobi, also seeking declaratory and injunctive relief, challenged the Louisiana statute on vagueness grounds. The district court consolidated these two cases.

Motions for judgment on the pleadings and supporting memoranda were filed by all parties. Pursuant to Fed. R. Civ. P. 12(c), the district court granted the plaintiffs' motion for judgment on the pleadings on the grounds that under *Roe v. Wade,* the Louisiana Abortion Statute is unconstitutional. The state appeals.

II

The Louisiana Abortion Statute was passed on June 18, 1991.[2] It amends and reenacts LSA-R.S. 14:87. The Statute makes it a crime to "administer[] or prescrib[e] any drug, potion, medicine, or any other substance to a female" or to "us[e] any instrumental or external force whatsoever on a female" "with the specific intent of terminating a pregnancy." The Statute provides exceptions when: (1) the physician terminates the pregnancy in order to preserve the life or health of the unborn baby or to remove a dead unborn child; (2) the physician terminates the pregnancy to save the life of the mother; (3) pregnancy is the result of rape; and (4) pregnancy is the result of incest. Before an abortion can be performed under the rape and incest exceptions, certain reporting requirements must be met. For example, the victims must report the rape or incest to law enforcement officials. Also, abortions performed on rape and incest victims must be performed within the first thirteen weeks of pregnancy.

No criminal liability attaches to a woman seeking or procuring an abortion.

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[2] 1991 La. Acts 26.

III

In urging us to uphold the Statute, the state concedes that *Roe v. Wade* has not been expressly overruled. Instead, the state argues that *Roe* has been overruled *sub silentio* by *Webster* and its progeny.

On the other hand, Sojourner, et al., argue that we should avoid deciding this case on constitutional grounds. Instead, we should affirm the district court on the grounds that the Statute is preempted by FDA regulations and by the Food, Drug and Cosmetic Act. They also present alternative arguments: we should affirm the district court on the grounds that the Statute violates the Commerce Clause, on the grounds that the Statute is unconstitutional under *Griswold*, or on the grounds that the Statute is unconstitutional under *Roe*. Their argument that the Statute is preempted by federal law, that the Statute violates the Commerce Clause, and that the statute is unconstitutional under *Griswold* is contingent on their particular reading of the Statute. They argue that the Statute criminalizes the use of contraceptives in Louisiana that act after conception. They argue that if we entertain doubts about this construction of the Statute, we should, before reaching the other issues in this case, certify to the Louisiana Supreme Court the question of whether the Statute criminalizes the use of certain contraceptives.

Dr. Okpalobi argues that the Statute is unconstitutionally vague. His vagueness argument emphasizes the elusiveness of the definitions of the rape and incest exceptions. He also argues that this court should certify to the Louisiana Supreme Court the question of whether the Act violates the right to privacy guaranteed by Article 1, Section 5 of the Louisiana Constitution.

IV

Below, the plaintiffs challenged the facial validity of the Statute. Thus, we must determine whether the plaintiffs are correct that the Statute cannot be construed and applied without infringing upon constitutionally protected rights. *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991). The district court found that *Roe v. Wade* is still good law and that the Louisiana Abortion Statute clearly transgresses those constitutional rights, as enunciated in *Roe v. Wade*, of women who seek an abortion.

The Supreme Court recently reaffirmed the essential holding of *Roe v. Wade* in *Casey*. *Casey*, 60 U.S.L.W. at 4798. In *Casey*, the Court held that a woman has a right to chose to have an abortion before viability and that legislation restricting abortions before viability must not place an under burden on that right. *Id.* "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 4807. The Court held that before viability, a State's interests are not strong enough to support a prohibition of abortion. *Id.* at 4798. Thus, the Louisiana statute is clearly unconstitutional under *Casey*.

V

Sojourner, et al urge us to avoid deciding this case on constitutional grounds and to affirm the district court on the grounds that the Statute is preempted by FDA regulations and the Food, Drug and Cosmetic Act, arguing that we must, when possible, decide a case on statutory rather than constitutional grounds. We can, of course, affirm the district court's judgment on any grounds supported by the record. *Mangaroo v. Nelson*, 864 F.2d 1202,

1204 n.2 (5th Cir. 1989). Furthermore, we acknowledge that it is usually true that if a case can be decided either on statutory or constitutional law, we should address the statutory issue first. *Harris v. McRae,* 448 U.S. 297, 306-307 (1980). We do not think, however, that the facts and the procedural posture of this case warrant the application of this jurisprudential principle. The plaintiffs brought a facial challenge to the constitutionality of the Statute. The district court entered a judgment on the pleadings on the grounds that the Statute was unconstitutional under *Roe v. Wade.* It did not address the preemption issue. There was no trial or hearing to develop the record with respect to the several crucial factual and legal issues that underlie the premption arguments, including whether certain contraceptives act after contraception, and if so, whether the Statute criminalizes the use of these contraceptives. Additionally, we are not applying a new interpretation of the Constitution to decide this case; we are only applying the clear holding of *Casey*. Therefore, the facts and posture of this case do not obligate us to reach the statutory issue first.[3]

Similarly, Dr. Okpalobi urges us to avoid deciding the case on federal constitutional grounds by certifying the question to the Louisiana Supreme Court whether, because it invades the right of privacy, the Statute is unconstitutional under the Article 1, Section 5 of the Louisiana Constitution. Because Dr. Okpalobi raises this issue for the first time on appeal, we do not address it. *Honeycutt v. Long,* 861 F.2d 1346, 1352 (5th Cir. 1988). Planned Parenthood of Louisiana, as amicus curiae, argues that we should abstain from deciding this case because there is a pending

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[3] Since we decide this case on the grounds that the Statute is unconstitutional under *Casey*, Sojourner's motion to certify the question of whether the Louisiana Abortion Statute criminalizes the use of certain contraceptives is denied.

state court challenge to the Statute under the Louisiana Constitution.[4] This argument was also raised for the first time on appeal, and we therefore do not address it. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 840 n.13 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

VI

In conclusion, we hold that the Louisiana statute, on its face, is plainly unconstitutional under *Casey* because the statute imposes an undue burden on women seeking an abortion before viability.[5] The order of the district court is therefore

AFFIRMED.

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[4] Apparently, the state court action was stayed pending the outcome of this suit.

[5] Because we decide the case on the grounds that the Statute is unconstitutional under *Casey*, we do not reach the appellees' arguments that the Statute violates the Commerce Clause, that the Statute is unconstitutional under *Griswold*, or that the Statute is unconstitutioonally vague.

EMILIO M. GARZA, Circuit Judge, concurring specially:

I agree with Judge Jolly that "the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, . . . reaffirmed the essential holding of *Roe v. Wade*"[1] and that "the Louisiana [Abortion] Statute is clearly unconstitutional under *Casey*."[2] *See Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2804, 120 L. Ed.2d 674 (1992) ("After considering the fundamental constitutional question resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* [that a woman has the right to terminate her pregnancy before viability] should be retained and once again reaffirmed."). Accordingly, I concur in Judge Jolly's opinion.

Casey, nonetheless, causes me concern. "The issue is whether [abortion] is a liberty protected by the Constitution of the United States." *Id.* at 2874 (Scalia, J., dissenting). Two essential facts seem apparent: "[T]he Constitution says absolutely nothing about [abortion], and . . . the longstanding traditions of American Society have permitted [abortion] to be legally proscribed."[3] *Id.*. (footnote omitted) (citation omitted). *Casey* "decorate[s] a value

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[1] 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

[2] slip op. at 2.

[3] *Compare Roe*, 410 U.S. at 138-42, 93 S. Ct. at 719-21 (historical review of abortion laws in America) *with Michael H. v. Gerald D.*, 491 U.S. 110, 121-28, 109 S. Ct. 2333, 2341-44, 105 L. Ed. 2d 91 (1989) (overview of presumption of legitimacy) *and Bowers v. Hardwick*, 478 U.S. 193, 191-95, 106 S. Ct. 2841, 2844-46, 92 L. Ed. 2d 140 (1986) (brief history and list of sodomy laws in America).

judgment[4] and conceal[s] a political choice." *Id.* at 2875. If this assessment is correct, the Court's reaffirmance—whether viewed as a good or bad result—has accelerated the Court "towards systematically eliminating checks upon its own power; and [at least with *Roe* and *Casey*] it [has] succumb[ed] [to this temptation]." *Id.* at 2874.

Because the decision to permit or proscribe abortion is a political choice, I would allow the people of the State

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[4] The joint opinion states: "Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest." *Casey*, 112 S. Ct. at 2806. I do not agree with the joint opinion's articulation of the issue. First, States legislate morality every day in the form of criminal statutes. For example, "[a] person commits an offense if he . . . intentionally or knowingly causes the death of an individual," *see* Tex. Pen. Code Ann. § 19.02 (West 1992), is the legal formulation of the commandment: "Thou shall not kill." *See Bowers v. Hardwick*, 478 U.S. at 196, 106 S. Ct. at 2846 ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts [would] be very busy indeed.").

Second, the underlying constitutional issue is not "whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter," but whether States have the constitutional power to make this ontological choice. For example, States choose for ontological reasons, to protect the lives of their citizens. In this instance, "liberty" gives way to protection of human life. *See Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., dissenting) ("To look 'at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.' " (quoting *Michael H. v. Gerald D.*, 491 U.S. at 124 n.4, 109 S. Ct. at 2342 n.4 (1989))). The ultimate question—if one accepts the joint opinion's view that viability is critical—is whether States have the constitutional authority to decide for themselves whether viability makes an ontological difference.

of Louisiana to decide this issue for themselves.[5] Nonetheless, I acknowledge that *Casey* controls, and therefore, I concur.

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[5] *See Michael H.*, 491 U.S. at 122, 109 S. Ct. at 2341 ("Whenever the Judiciary [realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, strikes down legislation adopted by a State], it unavoidably preempts for itself another part of the governance of the country without express constitutional authority." (quoting *Moore v. East East Cleveland*, 431 U.S. 494, 544, 97 S. Ct. 1932, 1958, 52 L. Ed. 2d 531 (1977))).

A-11

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3677

FILED
SEP 22 1992

D.C. Docket No. CA-91-2247-H & CA-91-2422-H

SOJOURNER T, on Behalf of Herself and All Others Similarly Situated, ET AL.,

Plaintiffs-Appellees,

versus

EDWIN W. EDWARDS, As Governor of the State of Louisiana, ET AL.,

Defendants-Appellants.

****

DR. IFEANYI CHARLES OKPALOBI,

Plaintiff-Appellee,

versus

RICHARD P. IEYOUB, Attorney General of the State of Louisiana, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before JOLLY, and EMILIO M. GARZA, Circuit Judges, and SHAW, District Judge.[1]

ISSUED AS MANDATE: OCT 14 1992

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[1]Chief Judge of the United States District Court of the Western District of Louisiana, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

September 22, 1992

APPENDIX B

OPINION OF THE DISTRICT COURT

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF LOUISIANA

SOJOURNER T, ET AL — CIVIL ACTION

VS. — NO. 91-2247

BUDDY ROEMER, AS GOVERNOR OF
THE STATE OF LOUISIANA, ET AL — SECTION "H"

CONSOLIDATED WITH

DR. IFEANYI CHAS. OKPALOBI

VERSUS — NO. 91-2422

STATE OF LOUISIANA, ET AL — SECTION "H"

REASONS FOR JUDGMENT

When the pleadings demonstrate that there is no factual issue which could change the result, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). At my first meeting with counsel on the day after the first of these two consolidated actions was files, I suggested that this case would meet the test. After consideration of motions for judgment on the pleadings and extensive supporting memoranda filed by all of the parties, I have concluded that no facts which could be developed at a trial could change the legal result dictated by *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705 (1973). Therefore, for the following

reasons, the motions for judgment will be entered declaring Act 26 of the 1991 Louisiana Legislature unconstitutional and enjoining its enforcement.

Justice White's dissenting opinion in *Roe v. Wade,* 410 U.S. at 222-23, 93 S. Ct. at 763, includes the following statement, with which I wholeheartedly agree:

> The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand.

However, the majority opinion in *Roe*, not Justice White's dissent, is still the law of this land. The Constitution of the United States means what the Supreme Court states that it means at any given time. Just two years ago, in *Webster v. Reproductive Health Services,* the appellants and the United States Department of Justice as *Amicus Curiae* urged the Court to overrule *Roe*; Justice Scalia in his concurring opinion did likewise. The Court declined to do so, I quote from the Chief Justice's opinion: "This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, *id.* at 164, and we leave it undisturbed." *Webster v. Reproductive Health Services,* 492 U.S. 490, 521, 109 S. Ct. 3040, 3058 (1989). The Court has still not revisited *Roe.*

The Texas statute held unconstitutional in *Roe* is in all pertinent respects identical to the Louisiana statute under attack here. Thus *Roe* in effect declares the Louisiana statute unconstitutional. Even though the Supreme Court has thus far explicitly refused to overrule *Roe*, counsel for defendants urge that I should anticipate that it will now do so. The Supreme Court has repeatedly held that I have no such authority:

> Needless to say, only this Court may overrule one of its precedents. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S. Ct. 1343, 1344, 75 L. Ed. 2d 260 (1983).
> . . . unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower court, no matter how misguided the judges of those courts may think it to be. *Hutto v. Davis*, 454 U.S. 370, 375 (1981).

Defendants contend that a decision upholding the constitutionality of the Louisiana statute under attack would not amount to the overruling of *Roe*. They argue that *Webster* and two later Supreme Court decisions[1] have effectively overruled *Roe, sub silentio*. There are persuasive authorities cited in support of the right (arguably, the duty) of a lower court to decline to apply Supreme Court precedent when the Court in later decisions has itself *de facto* overruled that precedent, although not expressly. The temptation to apply that principle is great, especially when I agree with the result which would follow. But I cannot conclude that *Roe* has been overruled by implication in the face of an explicit refusal in *Webster* to overrule it expressly. A lower court cannot decide that a Supreme Court de-

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[1] *Hodgson v. Minnesota*, ___ U.S. ___, 110 S. Ct. 2926 (1990); *Ohio v. Akron Center for Reproductive Health*, ___ U.S. ___, 110 S. Ct. 2972 (1990).

cision has been overruled *de facto* when in three cases in the past two years the Supreme Court has declined the opportunity to overrule that decision *de jure.* No one could seriously argue that in cases after *Roe* the Court has acted *sub silentio*[2] as to the *Roe* decision.

Every judge in the United States takes an oath to uphold the Constitution as it is interpreted by the U.S. Supreme Court. No judge in the United States enjoys the luxury of applying his or her own interpretation of the U.S. Constitution with respect to an issue which the United States Supreme Court has previously decided. No judge in the United States can overrule *Roe v. Wade;* only the Supreme Court can do so.

Other issues are raised by the pleadings and in memoranda. I do not consider them, because under the *Roe* decision they cannot make any difference in the result. I recognize that if the Supreme Court overrules *Roe v. Wade,* one or more of these issues may have to be considered on remand.

It matters not what my personal opinion may be as to whether the United State Constitution nullifies the action of elected state legislators in prohibiting abortions under certain circumstances. I am bound by my oath of office to decide that under the existing Supreme Court interpretation, the Louisiana statute under attack is unconstitutional.

Disposition of claims for attorney's fees is deferred until the conclusion of the litigation.

8/7/91
/s/ Adrian Duplantier
Judge

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[2] Sub silentio. Under silence; without any notice being taken. Black's Law Dictionary 1428 (6th ed. 1991).

APPENDIX C

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOJOURNER, T., ET AL	CIVIL ACTION
VERSUS	NO. 91-2247
BUDDY ROEMER, AS GOVERNOR OF THE STATE OF LOUISIANA, ET AL	SECTION "H"

CONSOLIDATED WITH

DR. IFEANYI CHAS, OKPALOBI	
VERSUS	NO. 91-2422
STATE OF LOUISIANA, ET AL	SECTION "H"

J U D G M E N T

Considering the court's Reasons for Judgment filed in the record this date, and further considering the court's direction as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs and against defendants, declaring Act 26 of the 1991 Louisiana Legislature unconstitutional and enjoining defendants from enforcing said statute.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the disposition of the claims for attorney's fees is hereby deferred until the conclusion of the litigation.

New Orleans, Louisiana, this 7th day of August, 1991.

/s/ Adrian Duplantier

UNITED STATES DISTRICT JUDGE

APPENDIX D

ACT 26 OF THE 1991 LOUISIANA LEGISLATURE

HOUSE BILL NO. 112

BY: REPRESENTATIVE SAM THERIOT, SENATOR BARES, REPRESENTATIVE DIMOS, LANCASTER, LABORDE, SITTIG, HIGGINBOTHAM, ACCARDO, ACKAL, DIEZ, DONELON, GLOVER, GUIDRY, HAIK, HERRING, LEBLANC, LEMOINE, MARTIN, STELLY, AND STINE AND SENATORS MCPHERSON, PICARD, CRAIN, SAUNDERS, BRINKHADS, AND POSTON

AN ACT

To amend and reenact R.S. 14.87, relative to abortion; to define and prohibit abortions; to provide for exceptions; to provide for penalties; and to provide for related matter.

Be it enacted by the Legislature of Louisiana:

Section 1. Legislative findings and purpose. Life begins at conception.

It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

In furtherance of this compelling interest we declare it

to be a reasonable and proper exercise of the police power of the state to prohibit and otherwise reasonably regulate, through the imposition of criminal penalties, the performance of abortions.

Section 2. R.S. 14:87 is hereby amended and reenacted to read as follows:

§ 87. Abortion

A.(1) Abortion is the performance of any of the following acts, with the specific intent of terminating a pregnancy.

(a) Administering or prescribing any drug, potion, medicine, or any other substance to a female; or

(b) Using any instrument or external force whatsover on a female.

(2) This Section shall not apply to the female who has an abortion.

B. It shall not be unlawful for a physician to perform any of the acts described in Subsection A of this Section if performed under the following circumstances:

(1)The physician terminates the pregnancy in order to preserve the life or health of the unborn child or to remove a dead unborn child.

(2) The physician terminates a pregnancy for the express purpose of saving the life of the mother.

(3) The physician terminates a pregnancy which is the result of rape as defined in either R.S. 14:42, R.S. 14:42.1, or R.S. 14:43 and in which all of the following requirements are met prior to the pregnancy termination:

(a) The rape victim obtains a physical examination and/or treatment from a physician other

than the physician who is to terminate the pregnancy within five days of the rape to determine whether she was pregnant prior to the rape and to prevent pregnancy and veneral disease, unless the rape victim is incapacitated to such a degree that she is unable to obtain this examination. If the victim is unable to obtain the examination due to such incapacity, then an examination shall be performed within five days after the incapacity is removed; and

(b) The rape victim reports the rape to law enforcement officials within seven days of the rape unless the victim is incapacited to such degree that she is unable to report the rape. If the victim is unable to report the rape due to such incapacity, then a report shall be made within seven days after the incapacity is removed; and

(c) The abortion is performed within thirteen weeks of conception.

(4) The physician terminates a pregnancy which is the result of incest as defined in R.S. 14:78, provided the crime is reported to law enforcement officials and the abortion is performed within thirteen weeks of conception.

C.(1) Prior to the performance of any abortion under Subsection (B)(3) or (B)(4) of this Section, the physician who is to perform the abortion shall obtain from the victim a statement in writing verifying that she has obtained the physical examination and shall obtain written verification by a law enforcement official that the victim reported the rape to law enforcement officials as required under this Section.

(2) Every physician who conducts a physical ex-

amination of a rape victim within five days of the rape shall immediately upon written request of either the victim or the physician who is to perform the abortion on the victim, provide to the victim or the requesting physician written verification of his examination.

(3) Every law enforcement official who receives a report of a rape victim within seven days of the rape or receives a report of incest shall immediately, upon written request of either the victim or the physician who is to perform the abortion, provide to the victim or requesting physician written verification of the report which was made to the official.

D. As used in this Section, the following words and phrases are defined as follows:

(1) "Law enforcement official or officer" means any peace officer or agency empowered to enforce the law in criminal matters within his or its respective jurisdiction, including but not limited to a state police officer, sheriff, constable, local police officer, and district attorney.

(2) "Physician" means any person licensed to practice medicine in this state.

(3) "Unborn child" means the unborn offspring of human beings from the moment of conception until birth.

(4) "Conception" means the contact of spermatozoan with the ovum.

E.(1) Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years and shall be fined not less than ten thousand dollars nor more than one hundred thousand dollars.

(2) This penalty shall not apply to the female who has an abortion.

Section 3. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this act are hereby declared severable.

Section 4. This act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana.

/s/ _____
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ _____
PRESIDENT OF THE SENATE

_____
GOVERNOR OF THE STATE OF LOUISIANA

VETOED: June 14, 1991
/s/ Buddy Roemer

APPENDIX E

OPINION OF THE LOUISIANA ATTORNEY GENERAL

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Williamn J. Guste, Jr.
Attorney General

State of Louisiana
Department of Justice
Baton Rouge
70804-9005
September 24, 1991

OPINION NO. 91-419

Honorable John M. Mamoulides
District Attorney
Parish of Jefferson
Jefferson Parish Courthouse
Annex Building—5th Floor
Gretna, Louisiana 70053

Dear District Attorney Mamoulides:

In your letter of August 5, 1991, you requested an opinion of this office. You asked the following questions concerning Act 26 of 1991 relating to abortion:

1. What is the definition of pregnancy?
2. Does the Act apply to the prescription, administration and use of the oral contraceptive pill, the intrauterine device (IUD), and the morning-after pill?
3. What is the effect of the Act on the process of in vitro fertilization as regulation [sic] by La. R.S. 9:121-133?

Consistent with the answer we filed in *Sojourner, et*

al vs. Roemer, et al, No. 91-2247 on the docket of the United States District Court for the Eastern District of Louisiana, we respond to your questions as follows:

LSA-R.S. 14:87, as amended by Act 26, provides in pertinent part as follows:

§87 Abortion

A. (1) Abortion is the performance of any of the following acts, with the specific intent of terminating a pregnancy:

(a) Administering or prescribing any drug, potion, medicine, or any other substance to a female; or

(b) Using any instrument or external force whatsoever on a female.

1. Although Act 26 defines "conception" as the contact of spermatozoon and ovum, and it defines "unborn child" as the unborn offspring of human beings from conception until birth, the Act does not define the term "pregnancy". It is not necessary that it do so. In interpreting a statute, words and phrases should be used in their context and should be construed in accordance with common and approved usage. See LSA-R.S. 1:3 and LSA-R.S. 14:3. Thus the term pregnancy must be given its customary meaning.

Within the medical profession, pregnancy is understood to refer to a woman's condition after implantation of a fertilized ovum. It is defined as "the condition of having a developing embryo or fetus in the body, after the union of an ovum and spermatozoon."[1] The term "em-

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[1]See *Dorland's Illustrated Medical Dictionary* 1349, 543 (27th Ed. 1988); *Williams Obstetrics* 8-10 (18th Ed. 1989). Both Dorland's and

bryo" is commonly and appropriately used to describe the unborn child once the embryonic disc forms at about the eighth day after contact of ovum and spermatozoon. The embryonic period extends until about the eighth week, after which the developing human is known as a fetus.[2] Because implantation of the fertilized ovum occurs on approximately the sixth day after union of ovum and spermatozoon, it is clear that the embryo is not considered by medical experts to exist until some time after implantation of the fertilized ovum.[3]

In everyday medical usage the term pregnancy is equated with implantation.[4] Implantation in the fallopian tube or other extra uterine site is referred to as a tubal or ectopic pregnancy. The important point is that the Act makes criminal only those actions taken with the specific intent of terminating a pregnancy, unless done for the health of the unborn child, to remove a dead unborn child, to save the life of the mother, or in certain cases of rape and incest.

Footnote continued.

Williams were used and relied upon by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113 at 130, 160; 93 S.Ct. 705 at 716, 730 (1973).

[2] K. Moore, *Before We Are Born, Basic Embryology and Birth Defects 1 (2nd Ed. 1983).*

[3] *See Dorland's, supra* note 1 at 824.

[4] See *Williams Obstetrics* 8-10 (18th Ed. 1989); U.S. Department of Health and Human Services regulations define pregnancy as follows:

§46.203 Definitions:

((b) "Pregnancy" encompasses the period of time from confirmation of implantation (through any of the presumptive signs of pregnancy, such as missed menses, or by a medically acceptable pregnancy test), until expulsion or extraction of the fetus.)

Protection of Human Subjects, 45 C.F.R. §46:203 (1990). See also, Complaint, Para 42, *Sojourner et al vs. Roemer et al, U.S.D.C., E.D. La., CA 91-2247.*

Therefore, anything done which has operative effect before implantation is not affected by or subject to the criminal provisions of Act 26.

2. Our examination and analysis of Act 26 leads us to conclude that the Act does not apply to the prescription, administration and use of the oral contraceptive pill, the intrauterine device (IUD), and the morning-after pill.[5] The Act proscribes, with criminal sanctions, only the administering or prescribing of any drug, potion, medicine or other substance or use of any instrument or external force on a female with the specific intent of terminating a pregnancy. The oral contraceptive pill, IUD and morning-after pill operate and have their effect prior to implantation, i.e., prior to pregnancy. Therefore, Act 26 will have no effect on the prescribing, administering or use of such drugs or devices.[6]

3. We have also been asked what effect Act 26 will have on efforts by women to become pregnant through the process of in vitro fertilization. In Louisiana in vitro fertilization is regulated by La. R.S. 12:121-133. As is evident from those statutes and the common understanding of in

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[5] The criminal sanctions of the Act do apply to the administering or prescribing of any drug which has its operative effect *after* the onset of pregnancy, i.e., after implantation. Thus, drugs, including RU 486, when administered or prescribed for use after implantation are prohibited under the Act.

[6] *Williams, supra,* at note 4, at 922-923, 929 and 931. How and when some oral contraceptives and the IUD work is a matter of considerable debate. The question debated is whether "the pill' and "the IUD" suppress ovulation (the release of the ovum) thereby preventing conception (as defined by Act 26 as contact of the spermatozoon and ovum) or whether they act to prevent implantation, or whether they act both to suppress ovulation and prevent implantation. For the purpose of Act 26, the debate need not be resolved, because Act 26 has no effect until after implantation of a fertilized ovum.

vitro fertilization, it is a process intended to ultimately result in pregnancy. There is no pregnancy, however, during the process and Act 26 does not apply until after the successful implantation of a fertilized ovum.

Act 26 reaffirms Louisiana's longstanding position that life begins at conception and Louisiana's policy of protecting to the greatest extent possible the life of the unborn child from conception until birth. However, in order to prove the elements of the crime of abortion as defined by Act 26, a prosecutor must prove beyond a reasonable doubt that someone other than the woman with child acted with the specific intent of terminating a pregnancy. Because medical tests to determine whether conception has occurred are not reliable until a time following sexual intercourse coincident with implantation, it would not be possible to prove the requisite specific intent for actions taken prior to the time of implantation, i.e., prior to pregnancy.

In enacting Act 26 the Legislature effectively reinstated Louisiana's criminal law regarding abortion as it existed before the United States Supreme Court's 1973 decision in *Roe v. Wade*. In reenacting its prior law, the Legislature used more modern language for its definition of abortion, made explicit the exception for protecting the life of the mother and the exemption of the pregnant woman from prosecution, and added exceptions for abortion performed in cases of rape and incest under certain circumstances. The new statute also provides a financial penalty in addition to the one to ten years imprisonment which was provided in the prior law.

The pre-*Roe v. Wade* definition of abortion contained in LSA-R.S. 14:87 was the performance of certain acts "with the intent of procuring premature delivery of the embryo of (sic) fetus." The recently enacted Act 26 also

extends the protection of the criminal law to the embryo and fetus by prohibiting the termination of a pregnancy except under certain specified conditions. The new statute takes the same approach and is in accord with Louisiana's law prohibiting abortion as it existed prior to 1973.[7]

In consideraing the application of LSA-R.S. 14:87, we note that the guidelines of LSA-R.S. 14:3 apply. That section provides as follows:

> The article of this code cannot be extended by analogy so as to create crimes not provided for herein; however in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.

This rule of stricti juris, or strict construction, requires that a criminal statute be strictly construed in factor of the accused. We must adhere to that rule of interpretation. (See *State v. Young,* 357 So.2d 503 (La. 1978); *State v. Sloan,* 139 La. 881, 72 So. 428 (1916).

It is the opinion of this office that LSA-R.S. 14:87, which prohibits abortions except in specific circumstances, does not prohibit authorized and licenses (sic) medical personnel from prescribing, or administering medicines,

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[7] Use of the more modern language in the current statute also avoids the problem of possible dismissal of a prosecution because the information or indictment refers to an embryo when evidence might establish that the pregnancy was far enough along so that a fetus was actually aborted. See, e.g., *State v. DORE,* 227 La. 282, 79 So.2d 209 (1955). See also, *Rosen v. La. State Board of Medical Examiners,* 319 F.Supp. 1217 (E.D. La. 1970).

drugs, potions, substances or instruments that operate to prevent pregnancy rather than to terminate pregnancy. Because IUD's, oral contraceptives and "the morning-after pill" prevent rather than terminate pregnancy, their use is not made illegal by LSA-R.S. 14:87; nor is the process of in vitro fertilization subject to Act 26 until subsequent to the implantation of a fertilized ovum in a female's uterus.

Yours very truly,

/s/

WILLIAM J. GUSTE, JR.
Attorney General

WJG,Jr./gbs

APPENDIX F

States Recognizing That Human Life Begins at Conception

Alabama:

Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916) (interpreting state abortion law) (" 'does not the new being from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?" ') (quoting from the 1911 Transactions of the Medical Association of Alabama)

Wolfe v. Isbell, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973) (rejecting viability requirement in wrongful death action where death occurs after live birth):

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based upon viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.

Eich v. Town of Gulf Shores, 293 Ala. 95, 98-99, 300 So. 2d 354, 356-57 (1974) (rejecting live birth requirement in wrongful death action) (stating that "the paramount purpose of our wrongful death statutes . . . is the preservation of human life" and holding that "it is illogical to allow liability to depend on whether death from fatal injury occurred before or after live birth")

Alabama Constitutional Convention Call (S.J. Res. 9, 1980 Ala. Acts 396):

> [A]pplies to the Congress . . . to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution that would protect the lives of all human beings including unborn children at every stage of their biological development and providing that neither the United States nor any state shall deprive any human being, from the moment of fertilization, of the right to life without due process of laws, nor shall any state deny any human being, from the moment of fertilization, the equal protection of the laws, except where pregnancy results from rape or incest; or where abortion is necessary to save the life of the mother; or where testing revealed abnormality or deformity of the fetus.

Arizona:

Nelson v. Planned Parenthood Center of Tucson, 19 Ariz. App. 142, 505 P.2d 580, 586 (1973) (construing state abortion law):

> One cannot gainsay a legislative determination that an embryonic or fetal organism is 'life.' Once begun, the inevitable result is a human being, barring prior termination of the pregnancy.

Ariz. Rev. Stat., §13-1103(A)(5) (West 1989) (defining offense of manslaughter to include "[k]nowingly or recklessly causing the death of an unborn child at any state of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred")

Summerfield v. Superior Court, 144 Ariz. 467, 476, 698 P.2d 712, 721 (1985) ("this statute [§13-1103(A)(5)] is in the section traditionally associated with the killing of persons (manslaughter) and . . . it refers not to a fetus but to an unborn child")

Ariz. Rev. Stat., §13:702(D)(10) (West 1989) (death of an unborn child "at any stage of its development" an aggravating circumstance for purposes of sentencing)

Arkansas:

Ark. Const., Amend. 68, §2 ("[t]he public policy of Arkansas is to protect the life of every unborn child from conception until birth, ...")

Arkansas Constitutional Conventiion Call (Res. of Feb. 17, 1977, H.R.J. Res. 2):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right of life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

Ark. Code Ann., §5-13-201(A)(5) (1991 Supp.) (amending first degree battery statute to include physical injuries to pregnant woman resulting in miscarriage or stillbirth)

California:

Cal. Pen. Code, §187(a) (West 1988) ("[m]urder is the unlawful killing of a human being, or a fetus, with malice

aforethought")

People v. Apodaca, 78 Cal. App. 2d 479, 486, 142 Cal. Rptr. 830, 835 (1978) (§187 "gives to all persons of common intelligence ample warning that an assault on a pregnant woman without her consent for the purpose of unlawfully killing her unborn child can constitute the crime of murder")

Cal. Civ. Code, §29 (West 1982) ("[a] child conceived but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth")

Scott v. McPheeters, 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (1939) (it is "an established and recognized fact by science and by everyone of understanding" that "an unborn child is a human being separate and distinct from its mother")

Connecticut:

Conn. Gen. Stat., Ann. §53-31(a) (1985) ("[t]he public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception") (rep. by P.A. 90-113, §4 (1990))

Simon v. Mullin, 34 Conn. Sup. 139, 147, 380 A.2d 1353, 1357 (1977) (rejecting viability requirement in wrongful death action where death occurs after live birth) ("[t]he development of the principle of law that now permits recovery by or on behalf of a child born alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law")

Delaware:

Scott v. State, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955) (characterizing abortion law as one which defines an offense against the lives and persons of individuals)

Delaware Constitutional Conventioin Call (Res. of May 23, 1978, H.R. Con. Res. 9):

> Requests Congress to call a convention to propose a constitutional amendment that would protect the lives of all human beings, including unborn children at every stage of their biological development.

District of Columbia:

Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D. D.C. 1946) (recognizing cause of action for prenatal injuries) ("[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact")

Greater Southeast Community Hosp. v. Williams, 482 A.2d 394, 396 (D.C. Ct. App. 1984) (rejecting viability requirement in wrongful death actien where death occurs after live birth) (referring to "established medical fact that a fetus is a person separate from its mother")

Florida:

Day v. Nationwide Mut. Ins. Co., 328 So.2d 560, 561 (1976) (rejecting viability requirement in case of prenatal injuries) (quoting with

approval Prosser, *Handbook of the Law of Torts*, §55 at 336 (4th ed. 1971)):

> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending upon the health of the mother and child and many other matters in addition to the stage of development. Certainly, the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.[1]

Georgia:

Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956) (rejecting viability requirement in case of prenatal injuries) ("[i]f a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover") (a dissent characterized majority opinion as holding, in effect, "that an infant becomes a 'person' from the moment of conception, with the right to sue for a tortious injury after its birth"), *id.* at 506, 93 S.E.2d at 729

Morrow v. Scott, 7 Ga. 535, 537 (1849) ("[i]n . . . general, a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered")

Gulf Life Ins. Co. v. Brown, 181 G. App. 72, 74, 351 S.E. 2d 267, 269 (1986) ("unquestionably, Georgia cases show a clear tendency toward placing a high premium on

[1] To which to the Fifth Edition of Prosser & Keaton (1984) adds: "With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether." *Id.* at 369.

human life and an unmistakable willingness to recognize a fetus as a person at a time prior to actual delivery")

Idaho:

Nash v. Meyer, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934) (construing state abortion law) (criminal abortion statute intended "to discourage abortions because thereby the life of a human being, the unborn child, is taken")

Blake v. Cruz,, 108 Idaho 253, 261, 698 P.2d 315, 323 (1984) (Bistline, J., concurring in part and dissenting in part) ("[t]his Court recently committed itself to the proposition that an unborn child is a person in being," citing *Volk v. Baldazo,* 103 Idaho 570, 651 P.2d 11 (1982) (rejecting live birth requirement in wrongful death action where death occurs after viability))

Idaho Constitutional Convention call (S. Con. Res. 132, 45th Legis. 2d Sess., 1980 Idaho Sess. Laws 1005):

> Request[ ]s that the Congress . . . call a constitutional convention for the specific and exclusive purpose of proposing an amendment . . . [to provide that]:
>
> [a] From the moment of conception a person shall be guaranteed all personal rights extended to all individuals under the constitution and laws of the United States of America and the state or states of residence and only under extreme circumstances shall it be otherwise, namely, to save the life of the mother, or other extenuating circumstances where at least two consulting physicians, one not having previously been involved in the case, and after due and thorough consultation with all persons having the legal right

to be involved, find it is necessary and just that the life of the unborn shall be terminated.

(b) Provide that the several states shall have the power to enforce such an amendment and establish priority of life by appropriate legislation.

Illinois:

Ill. Ann. Stat., ch. 38, ¶81-21 (Smith-Hurd 1977) (preamble to Illinois Abortion Act of 1975):

[T]he General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the moment of conception and is, therefore, a legal person, for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and constitution of this State . . . .

Renslow v. Mennonite Hospital, 67 Ill.2d 348-352-53, 367 N.E.2d 1250, 1252-53 (1977) (rejecting viability requirement in cause of action for prenatal injuries)

Ill. Rev. Stat., ch. 70, ¶2.2 (1991) (amending wrongful death statute to allow wrongful death action to be brought on behalf of an unborn child without regard to the stage of pregnancy when the child is injured or whether there is a live birth)

Ill. Rev. Stat., ch. 38, ¶9-1.2(b)(1) (1991) (defining "unborn child" as "any individual of the human species from fertilization until birth")

Ill. Rev. Stat., ch. 38, ¶¶9-1.2, 9-2.1, 9-3.2, 12-3.2, 12-4.4 (1991) (amending criminal code to define broad range

of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Indiana:

Cheaney v. State, 259 Ind. 138, 145, 285 N.E.2d 265, 268 (1972) (construing state abortion law) ("[i]t is now established that some sort of independent life begins at conception," rejecting quickening and viability as outdated and arbitrary distinctions)

Cowe v. Forum Group, Inc., 541 N.E.2d 962, 967-68 (Ind. App. 1989), *rev'd and remanded on other grounds,* 575 N.E.2d 630 (Ind. 1991) (recognizing cause of action for prenatal injuries at any time after conception and rejecting viability requirement)

Kentucky:

Ky. Rev. Stat. Ann., §311.710(5) (Michie/Bobbs-Merrill 1990):

> If . . . the United States constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.

Ky. Rev. Stat. Ann., §311.720(5), (6) (abortion regulations) (defining "fetus" as "a human being from fertilization until birth" and "human being" as "any member of the species homo sapiens from fertilization until death")

Kentucky Constitutional Convention call (H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401):

> [R]equest[s] Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution . . . :

> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every state of their biological development.
>
> Section 2. No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Louisiana:

La. Stat. Ann., §14.2(7) (West 1986) (defining "person" for purposes of criminal code to include "a human being from the moment of fertilization and implantation")

La. Stat. Ann., §§14:32.5-32.8 (West 1992 Supp.) (defining feticide offenses)

Danos v. St. Pierre, 383 So.2d 1019, 1027 (La. App. 1980), *aff'd,* 402 So.2d 633 (La. 1991) (Lottinger, J., concurring):

> This definition [La. Stat. Ann., §14.2(7) (West 1986)] added to the Criminal Code in 1976, reflects a legislative intent to classify an unborn child as a "person" for purposes of violent criminal conduct like homicide and battery. The definition reveals an express recognition by the legislature that life begins at the moment of conception and that this form of life can indeed be the victim of a harm, i.e., a murder or battery.

§1 of Acts 1991, No. 26 (amending state abortion law):

> It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

Johnson v. Southern New Orleans Light and Traction Co., Docket 9048 (La. App. Orl. Dec. 10, 1923) (rejecting live birth and viability requirements in cause of action for wrongful death) (quoted with approval in *Danos v. St. Pierre*, 402 So.2d 633, 639 (La. 1981)):

> The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe that the infant is a child from the moment of conception, although life may be in a state of suspended animation, the subject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.

Accord: Valence v. La. Power & Light Co., 50 So.2d 847 (La. App. 1951) (wrongful death of two to four month old unborn child).

Danos v. St. Pierre, 383 So.2d 1019, 1027 (La. App. 1980), *aff'd*, 402 So.2d 633 (La. 1991) (rejecting live birth requirement in action for wrongful death of a viable unborn child) (Lottinger, J., concurring):

> Viability has not been the controlling factor in some previous Louisiana cases allowing recovery [for wrongful death of a stillborn child], and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cut off point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable.

Louisiana Constitutional Convention Call (Res. of July 16, 1976, S. Con. Res. 70):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; requests state legislative bodies to apply to Congress to call a convention to propose this constitutional amendment; grants Congress and the states the power to enforce the amendment.

Maine:

Smith v. State, 33 Me. 48, 57 (1851) (construing criminal abortion statute which abolished the quickening distinction):

> There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, nowwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal

to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

Maryland:

Damasiewicz v. Gorsuch, 197 Md. 417, 438, 79 A.2d 550, 559 (1951) (recognizing cause of action for prenatal injuries) ("from a medical point of view, a child is alive within the mother before the time arrives when it can live apart from her"), *id.* at 440, 79 A.2d at 560 (theory that "an unborn child is a part of the mother" is "an outworn point of view, now rejected by modern medicine")

Group Health Ass'n v. Blumenthal, 295 Md. 104, 119, 453 A.2d 1198, 1207 (1983) ("a cause of action lies for the wrongful death of a child born alive who dies as a result of injuries sustained while *en ventre sa mere*") (rejecting viability requirement)

Massachusetts:

Commonwealth v. Cass, 392, Mass. 799, 801, 467 N.E.2d 1324, 1325 (1984) (viable fetus is a "person" within meaning of vehicular homicide statute):

In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in the normal course outside, the womb. . . . By the use of the term[ ] "person" . . . the Legislature has given no hint of a contemplated

> distinction between pre-born and born human beings.

Torigian v. Watertown News Co., Inc., 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967) (rejecting viability requirement in wrongful death action where death follows live birth)

Massachusetts Constitutional Convention Call (Act of June 8, 1977, H.R. 5984):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Michigan:

Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971) (recognizing cause of action for prenatal injuries and rejecting viability requirement because "a child has a legal right to begin life with a sound mind and body")

O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971) (recognizing cause of action for wrongful death of a viable stillborn child)

Larkin v. Cahalan, 389 Mich. 533, 540, 208 N.W.2d 176, 179 (1973) (construing state abortion law) ("statutes proscribing manslaughter by abortion are designed to protect human life and carry the necessary implication that

that life, the destruction of which is punishable as manslaughter, is human life")

Minnesota:

Minn. Stat. Ann., §§609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (1987 & 1992 Supp.) (amending criminal code to include a broad range of crimes, including homicide, that can be committed against an unborn child, regardless of gestational age)

Verkennes v. Corniea, 229 Minn. 365, 369, 38 N.W.2d 838, 840 (1949) (rejecting live birth requirement in wrongful death action) (quoting with approval federal district court opinion in *Bonbrest v. Kotz*, 65 F.Supp. 138, 140 (D. D.C. 1946), where court said "[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact")

Missouri:

Mo. Ann. Stat., §1.205.1(1) (Vernon Supp. 1992) (preamble to Missouri Abortion Law) ("[t]he life of each human being begins at conception")

Mo. Ann. Stat., §188.015(6) (Vernon Supp. 1992) (abortion regulations) (defining "unborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development")

Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. 1972) (construing criminal abortion law) (accepting stipulation that "unborn children have all the qualities and attributes of adult human persons differing only in age or maturity" and that "[m]edically, life is a continuum from conception to death")

Steggall v. Morris, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953) (rejecting viability requirement in cause of action for prenatal injuries)

Missouri Constitutional Convention Call (Res. of Apr. 24, 1975, S. Con. Res. 7):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function, or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Montana:

Mont. Code Ann., §50-20-102 (1991) (statement of legislative purpose and intent—abortion regulations):

> The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extent the protection of the laws of Montana in favor of all human life.

Mont. Code Ann., §41-1-103 (1991) ("[a] child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth")

Nebraska:

Neb. Rev. Stat., §28-325 (1989) (legislative findings in statutes regulating abortion) (legislators "deplore the destruction of the unborn human lives which has and will occur. . .as a consequence of the United States Supreme Court's decision," and lament their inability "to protect the life, health, and welfare of pregnant women and unborn human life")

Hans v. State, 147 Neb. 67, 72, 22 N.W.2d 385, 389, *on rehearing,* 147 Neb. 73, 25 N.W.2d 35 (1946) (statute defining offense of "foeticide" meant "the unlawful destruction of an unborn child, in ventre sa mere, at any stage of gestation")

Nebraska Constitutional Convention Call (Res. of Apr. 21, 1978, Legis. Res. 152):

> Legislature . . . petition[s] . . . Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution of the United States. . . .
>
> ARTICLE
>
> *Section 1.* With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> *Section 2.* No unborn child shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permit-

ting only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Nevada:

White v. Yup, 85 Nev. 527, 536-37, 458 P.2d 617, 623 (1969) (recognizing cause of action for prenatal injuries and for the wrongful death of a viable, stillborn child) (proposition that "[a]n unborn child is a part of its mother until birth and thus has no juridical existence" "has no scientific or medical basis in fact")

Nevada Constitutional Convention Call (S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014):

> [L]egislature requests . . . Congress . . . to call a convention limited to proposing an amendment to the Constitution . . . to protect human life by restricting abortion [subject to exceptions in cases where the pregnancy results from rape or incest and where continuation of the pregnancy would seriously endanger the life of the mother].

New Hampshire:

Bennett v. Hymers, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958) (rejecting viability requirement in cause of action for prenatal injuries) ("[w]e adopt the opinion that the fetus from the time of conception become a separate organism and remains so throughout its life")

Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 136 (1980) (wrongful death action) ("[t]o deny a nonviable

fetus a [wrongful death] cause of action is not to deny that life begins with conception")

N.H. Rev. Stat. Ann., §§631:1, 631:2 (1991 Supp.) (amending criminal assault statutes to include physical injuries to pregnant woman resulting in miscarriage or stillbirth)

New Jersey:

Smith v. Brennan, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960) (rejecting viability requirement in cause of action for prenatal injuries) ("[m]edical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body"):

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of independent existence. In the first place, age is not the sole measure of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application. . . . In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore, should be given the same opportunity for redress.

Id. at 367, 157 A.2d at 504.

In *Smith v. Brennan*, the New Jersey Supreme Court quoted with approval Chief Justice Brogan's dissent in *Stemmer v. Kline*, 128 N.J.L. 455, 466, 26 A.2d 489, 687 (1942):

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed to-day that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.

Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988) (granting to parents a common law cause of action where a physician negligently causes the pre-birth death of an infant)

State v. Gedicke, 43 N.J.L. 86, 89-90 (1881) (interpreting state abortion law) (state abortion law amended "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die")

New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

New Mexico

State v. Willis, 98 N.M. 771, 782, 652 P.2d 1222, 1223 (Ct. App. 1982) (holding that vehicular homicide statute did not apply to the death of an unborn viable fetus but recognizing that "this State and every other State has an interest in protecting the life of an unborn child") (result changed by statute)

N.M. Stat. Ann. §§30-3-7, 66-8-101.1 (1991) (defining new criminal offenses of "injury to pregnant woman" and "injury to pregnant woman by vehicle" resulting in miscarriage or stillbirth at any stage of gestational development)

New York:

Byrn v. City Hosp. Ass'n of New York City, 31 N.Y.2d 194, 199, 335 N.Y.S.2d 390, 392, 286 N.E.2d 887, 888 (1972) (rejecting constitutional challenge to pre-*Roe* abortion law which allowed abortion on demand through the twenty-fourth week of gestation):

> It is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that upon conception a fetus has an independent genetic "package" with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. It is human, if only because it may not be characterized as not human, and it is unquestionably alive.

Kelly v. Gregory, 282 A.D. 542, 543-44, 125 N.Y.S.2d

696, 697 (1953) (rejecting viability requirement in cause of action for prenatal injuries) ("legal separability should begin where there is biological separability" and "separability begins at conception"):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, postnatal as well as pre-natal.

Id. at 544, 125 N.Y.S.2d at 697.

North Carolina:

DiDonato v. Wortman, 320 N.C. 423, 435, 358 S.E.2d 489, 496 (1987) (recognizing cause of action for wrongful death of a viable unborn child) ("[t]he public policy of this state as expressed by the legislature in our statutes recognizes that an unborn child is a person") (Martin, J., concurring in part and dissenting in part)

Corkey v. Edwards, 322 F. Supp. 1248, 1252 (W.D.N.C. 1971), *vacated and remanded* (construing criminal abortion statute):

> Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human

attribute.

North Dakota:

N.D. Cen. Code, §§12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Hopkins v. McBane, 359 N.W.2d 862, 865 (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions) ("it is commonly understood that an unborn child is a human being or person which has life and which, even prior to the process of birth, can experience death")

statute providing that "[a] child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth" was intended "to ensure and to protect the interests of a child subsequent to its conception but prior to its birth"), *id.* 359 N.W. 2d at 864

Ohio:

Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law) (holding that human life is entitled to federal constitutional protection from conception) ("a new life comes into being with the union of human egg and sperm cells" and "such terms as 'quick' or 'viable', which are frequently encountered in legal discussion, are scientifically imprecise and without recognized meaning")

Williams v. Marion Rapid Transit, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949) (recognizing cause of action for prenatal injuries):

> To hold that the plaintiff in this case [a viable unborn child] did not suffer an injury in her person would require this court to announce that as a matter of law the infant is part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right [to a remedy] conferred by the [Ohio] Constitution upon all persons, by the application of a time worn fiction not founded on fact and within common knowledge untrue and unjustified.

The court also quoted with approval Prosser on Torts (3d ed.) wherein Professor Prosser stated, "So far as duty is concerned, if existence at the time [of injury] is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and that for many purposes its existence is recognized by the law." *Id.* at 127, 39 Ohio Ops. at 439, 87 N.E.2d at 339.

Oklahoma:

Okla. Stat. Ann., tit. 63, §1-730(2) (1984) (abortion regulations) (defining "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth . . . .")

Evans v. Olson, 550 P.2d 924, 925 (1976) (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions) ("there is no medical or scientific basis" for the proposition that "[a]n unborn child has no juridical existence apart from its mother")

Oregon:

State v. Ausplund, 86 Or. 121, 131-32, 167 P. 1019,

1022-23 (1917) (construing criminal abortion law):

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.

Mallison v. Pomeroy, 205 Or. 690, 696-97, 291 P.2d 225, 228 (1955) (recognizing cause of action for prenatal injuries) ("[i]n Oregon we have recognized by statute the separate entity of an unborn child by protecting him in his property rights and against criminal conduct, and we can see no logical reason why a viable child should not be protected for injuries sustained through the tortious acts of another")

Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636, 520 P.2d 361 (1974) (recognizing cause of action for the wrongful death of a viable stillborn child)

Pennsylvania:

Pa. Cons. Stat. Ann., tit. 18, §3203 (Purdon's 1992 Supp.) (abortion regulations) (defining "unborn child" and "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth")

Amadio v. Levin, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985) (rejecting live birth requirement in wrongful death actions) ("a child en ventre sa mere is a separate individual from the moment of conception")

Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (rejecting viability requirement in cause of action for prenatal injuries) (viability "has little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception")

Pennsylvania Constitutional Convention Call (H.R. 71, 1978 Gen. Assembly, 1978 Pa. Laws 1431):

> [A]pplication to the Congress . . . to call a convention for drafting and proposing an amendment to the Constitution . . . to guarantee the right to life to the unborn fetus by doing the following:
>
> (a) With respect to the right to life guaranteed in the United States Constitution, provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life.
>
> (b) Provide that Congress and the several states shall have concurrent powers to enforce such an amendment by appropriate legislation.
>
> * * *
>
> (d) Nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Rhode Island:

R.I. Gen. Laws, §11-3-4 (1981) (1973 R.I. Pub. Laws 68-70, ch. 15, §2) (criminal abortion statute):

> It shall be conclusively presumed in any action concerning the construction, application or validity of sec. 11-3-1 [prohibiting abortion] that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the Constitution . . . .

Sylvia v. Gobeille, 101 R.I. 76, 79, 220 A.2d 222, 223-24 (1966) (rejecting viability requirement in cause of action for prenatal injuries) (noting "the medical fact that a fetus becomes a living human being from the moment of conception" and rejecting viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence")

Presley v. Newport Hospital, 117 R.I. 177, 183, 365 A.2d 748, 751 (1976) (rejecting live birth requirement in wrongful death of a viable unborn child) (citing with approval the civil law proposition that "from the moment of conception a separate organism comes into existence" and the medical proposition that "an ovum, once it is fertilized, is a separate living entity"):

> [V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line

> between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. If it seems that if live birth is to be characterized, as is so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur.*

Id. at 188, 365 A.2d at 753-54 (*dicta* in plurality opinion).

Rhode Island Constitutional Convention Call (Act. of Apr. 21, 1977, H.R. 5150):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent power to enforce such an amendment.

South Dakota:

State v. Munson, 86 S.D. 663, 669, 201 N.W.2d 123, 126 (1972), *vacated and remanded,* 410 U.S. 950 (1973) (construing criminal abortion law) (citing with approval holding in *Steinberg v. Brown,* 321 F. Supp. 7431 (D. Ohio 1970), that human life is entitled to federal constitutional protection from conception)

S.D. Codified Laws Ann., §21-5-1 (1987) (amending wrongful death statute to include "an unborn child" without regard to gestational age)

S.D. Codified Laws Ann., §22-17-6 (1988) ("[a]ny person who intentionally kills a human fetus by causing an injury to its mother is guilty of a Class 4 felony")

S.D. Codified Laws Ann., §26-1-2 (1992) ("[a] child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth")

Tennessee:

Hogan v. McDaniel, 204 Tenn. 235, 243, 319 S.W.2d 221, 224 (1958) (rejecting cause of action for wrongful death of viable unborn child but recognizing "the biological fact that life begins at the moment of conception") (result overturned by statute, Tenn. Code Ann., §20-5-106(b) (1991).

Texas:

Thompson v. State, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) *vacated and remanded,* 410 U.S. 950 (1973) (construing criminal abortion law):

> The State of Texas is committed to preserving the lives of its citizens so that no citizen "shall be deprived of life . . . except by the due course of the law of the land." [Citation omitted]. [The Texas abortion law] is designed to protect fetal life . . . and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.

Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth), *rev'g* 413 S.W.2d 825 (Tex. Civ. App. 1967)

(denying cause of action) and *app'g* dissenting opinion of Justice Cadena, 413 S.W.2d at 828 ("medical science . . . consider[s] that life begins at conception"), *id.* at 829 ("legalistic concept that the unborn child is but a part of its mother" is "contrary to scientific fact and common sense")

Witty v. Am. Gen. Capital Dist., Inc., 727 S.W.2d 503, 505 (Tex. 1987) (denying cause of action for wrongful death of viable child who was stillborn but recognizing "the fetus as having an existence separate from its mother")

Yandell v. Delgago, 468 S.W.2d 475 (Tex. Civ. App. 1971) (rejecting viability requirement in cause of action for prenatal injuries), *writ ref'd n.r.e. per curiam,* 471 S.W.2d 569 (Tex. 1971)

Utah:

Utah Code Ann., §76-7-301.1(1) (1992) (preamble to Utah abortion law):

> It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Sections 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

§76-7-301.1(2):

> The State of Utah has a compelling interest in the protection of the lives of its unborn children.

§76-7-301.1(3):

> It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.

Utah Code Ann., §76-5-201(1) (1992 Supp.) (defining offense of criminal homicide as causing "the death of another human being, including an unborn child")

Utah Constitutional Convention Call (H.R.J. Res. 28, 42nd Legis., Reg. Sess., 1977 Utah Laws 1317, 1318):

> Requests Congress to call a convention for the purpose of drafting and submitting for ratification by the states, an amendment to the Constitution that will guarantee to every human life, from the moment of fertilization throughout its natural existence, in every state, territory, and possession of the United States, the full protection of all laws respecting life, excepting an unborn child whose mother's life would otherwise be lost.

Virginia:

Kalafut v. Gruver, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth) (noting "developments in medical science, especially in the field of embryology," court held that "an action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established")

Wisconsin:

Wis. Stat. Ann., §940.04(6) (West 1982) (criminal

abortion statute defining "unborn child" as "a human being from the time of conception until it is born alive")

Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 356, 99 N.W.2d 163, 170 (1959) (rejecting viability requirement in cause of action for prenatal injuries):

> The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and non-viability and fails to recognize the biological fact that there is a living human being before viability. A child is no more a part of its mother before it becomes viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.

Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis.2d 14, 21, 148 N.W.2d 107, 111 (1966) (rejecting born alive requirement in wrongful death actions) (assertion that "[a] child has no juridical existence apart from its mother" has "no scientific or medical basis in fact")

APPENDIX G

States That Treat The Killing of an Unborn Child as Homicide

Nine States define (by statute) the killing of an unborn child as a form of homicide, regardless of the stage of pregnancy:

Arizonia: Ariz. Rev. Stat. §13-1103(A)(5) (West 1989) (manslaughter)

California: Cal. Pen. Code, §187(a) (1988) (murder) (limited by judicial decision to viability, *see People v. Smith*, 59 Cal. App.3d 751, 129 Cal. Rptr. 498 (1976))

Illinois: Ill. Rev. Stat., ch. 38, ¶¶9-1.2, 9-2.1, 9-3.2 (1991) (murder, manslaughter)

Indiana: Ind. Code Ann., §35-42-1-6 (Burns 1985) (feticide)

Louisiana: La. Stat. Ann., §§14:2(7), 14:32.5-14:32.8 (West 1986 & 1992 Supp.) (murder, feticide)

Minnesota: Minn. Stat. Ann., §§609.266, 609.2661-609.2665, 609.268(1) (1987 & 1992 Supp.) (murder, manslaughter)

New Mexico: N.M. Ann. Stat., §66-8-101.1 (1987) (vehicular homicide), *see Reese v. State*, 106 N.M. 498, 504-05, 745 P.2d 1146, 1152-53 (1987) (Stowers, J., dissenting) ("[p]regnant women and their unborn

fetuses are protected by [this section], which extends the scope of the vehicular homicide statute . . . to vehicular injuries resulting in miscarriage or stillbirth")

North Dakota: N.D. Cent. Code, §§12.1-17.1-01 to 12.1-17-04 (1991 Supp.) (murder, manslaughter)

Utah: Utah Code Ann., §76-5-201 *et seq.* (1990 & 1992 Supp.) (any form of homicide)

Six States define (by statute) the killing of an unborn child after quickening as a form of homicide:

Florida: Fla. Stat. Ann., §782.09 (West 1992) (manslaughter)

Georgia: Off. Code Geo. Ann., §16-5-80 (1992) (feticide)

Michigan: Mich. Comp. Laws Ann., §750.322 (West 1968) (manslaughter) (limited by judicial decision to viability, *see Larkin v. Cahalan*, 389 Mich. 533, 208 N.W.2d 176 (1973))

Mississippi: Miss. Code Ann., §97-3-37 (1972) (manslaughter)

Oklahoma: Okla. Stat. Ann., tit. 21, §713 (West 1983) (manslaughter)

Washington: Wash. Rev. Code Ann., §9A.32.060(1)(b) (1986) (manslaughter)

Five States define (by statute or case law) the killing of an unborn child after viability as a form of homicide:

Iowa:	Iowa Code Ann., §707.7 (West 1979) (feticide)
Mass.:	*Commonwealth v. Cass,* 392 Mass. 799, 467 N.E.2d 1324 (1984) (vehicular homicide)
	Commonwealth v. Lawrence, 404 Mass. 378, 383-84, 536 N.E.2d 571, 575-76 (1989) (involuntary manslaughter)
S.C.:	*State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984) (homicide)
Tennessee:	Tenn. Code Ann., §39-13-214 (Michie 1991) (criminal homicide)
Rhode Island:	R.I. Gen. Laws, §11-23-5 (Michie 1981) (manslaughter)

One State defines (by statute) the killing of an unborn child after the twenty-fourth week of pregnancy as a form of homicide:

N.Y.:	N.Y. Pen. Law, §125.00 (McKinney's 1987) (homicide)

Three States define (by statute) as criminal assaults attacks on pregnant women causing miscarriage or stillbirth:

Arkansas:	Ark. Code Ann., §5-13-201(A)(5) (1991 Supp.)

New Mexico: N.M. Stat. Ann., §30-3-7 (1978)

Wyoming: Wyo. Stat., §6-2-502(a)(iv) (Supp. 1988)

Three States define (by statute) nonfatal attacks on an unborn child as criminal offenses:

Illinois: Ill. Rev. Stat., ch 38, ¶¶12-3.2, 12-4.4 (1991)

Minnesota: Minn. Stat. Ann., §§609.266, 609.267, 609.2671, 609.2672, 609.268(2)

North Dakota: N.D. Cent. Code, §§12.1-17.1-01, 12.1-17.1-05, 12.1-17.1-06

The foregoing statutes have been upheld as constitutional in the following decisions:

California: *People v. Apodaca*, 78 Cal.App.2d 279, 486, 142 Cal. Rptr. 830, 835 (1978)

People v. Henderson, 225 Cal.App.3d 1129, 1157-58, 275 Cal. Rptr. 837, 853-54 (1990)

People v. Bunyard, 45 Cal.3d 1189, 1237-41, 249 Cal. Rptr. 71, 103-06, 756 P.2d 795, 827-30 (1988)

Georgia: *Brinkley v. State*, 253 Geo. 541, 322 S.E.2d 49 (1984)

Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987)

Illinois: *People v. Ford*, 221 Ill. App. 3d 354, 366-72, 581 N.E.2d 1189, 1197-1202 (1991)

People v. Campos, 227 Ill. App. 3d 434, 451-52, 592 N.E.2d 83, 97 (1992).

Minnesota: *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990)

State v. Bauer, 471 N.W.2d 363, 365-66 (Minn. App. 1991)

APPENDIX H

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME came and appeared:

Raymond F. Gasser, Ph.d.D

who, after being sworn, did depose and say:

I am a professor of human embryology at Louisiana State University School of Medicine in New Orleans, Louisiana. I have been on that faculty since 1965 when I received my doctorate in human anatomy with special emphasis in human prenatal development. I have studied human embryos at every stage of development and have authored books and chapters in textbooks including obstetrical texts and texts on human embryology. A copy of my curriculum vitae is attached to this affidavit as Exhibit "A".

In essence, my professional life has been devoted to the science of human development. As a scientist, I have no doubt but that human life begins with the fertilization of the human ovum. With microscopic examination we scientists can now be certain during all stages of prenatal life, beginning with the first few cells, that the life before us is distinctly human.

There are two phases of individual human life. One after birth, referred to as postnatal, and one before birth, referred to as prenatal. The prenatal phase of life last approximately 38 weeks from the moment of fertilization or conception until birth. It consists of three periods, and is a continuum with the postnatal phase. The unborn, human

individual from conception to approximately seven days gestational age is referred to as a *zygote.* Once the embryonic disc begins to form at about the seventh to eighth day, the unborn individual is referred to as an *embryo.* During the embryonic period, all the organ systems of the body are laid down. At the end of the embryonic period, which is approximately eight weeks after conception, the developing individual is call a *fetus.* The fetus is the same individual that is the newborn after birth. The only difference is that the fetus has not yet passed through the birth canal to the outside.

The fertilization process begins when one living ovum makes contact with one living sperm. After release of an ovum from the ovary, the ovum enters the fallopian tube and moves in a downward direction towards the uterus. When intercourse occurs, approximately 200-500 million sperm are deposited inside the woman's body and they proceed up through the uterus in an attempt to unite with the ovum. Only one sperm fertilizes the ovum and that occurs in one of the two fallopian tubes. There is no scientific question that fertilization is the beginning of new individual human life.

Once fertilizatiion occurs, there are several things that begin. The sex of the new individual is determined genetically and the individuality of the cell is guaranteed by a process that shuffles the genetic code. After the union of the sperm and the ovum there is a cell formed that is a living, genetically unique and distinctly human individual. Every individual human life begins in this way as one cell, referred to as a zygote. Scientifically, there are no known exceptions to this.

As the zygote moves down the fallopian tube to reach the uterus and attach to the wall, the single cell

begins to multiply and form a ball of cells. It takes approximately one week for the zygote to make its journey to the uterus and attach to the uterine wall.

During the second week, the outer cells of the new individual erode into the wall of the mother's uterine lining and establish a relationship with her blood vessels. The body of the new individual then begins to form rapidly. During the third week, the heart forms and begins to beat and the brain begins to be laid down. Before the end of the first month after conception, beginnings of the mouth, brain, heart, gut and limbs can be identified.

At six weeks, electrical activity can be picked up from the brain of the new individual. The five adult subdivisions of the brain are present. Advances in imaging and monitoring permit us to say with absolute certainty that there is electrical activity in the human brain six weeks after conception. Exhibits "B", "C" and "D" to my Affidavit are photographs of six week old embryos.

At seven weeks sex can be determined microscopically. Also at this time the muscles and nerves are developed well enough that there is spontaneous movement of various parts of the embryo. Exhibits "E" and "F" are photographs of seven week old embryos. At eight weeks, the end of the second month of life, the face is distinctly human. All of the nerves and blood vessels that we teach medical students in labs to dissect in adult bodies are present at eight weeks after conception. Ninety-nine percent of the muscles are also present. This is the beginning of neuromuscular movements and the beginning of movements in response to touches on the skin. I have personally observed a film in which an eight week human embryo, is stroked on the face with a hair. That embryo responded with body movements. At the end of the eighth

week, there are toes on the ends of feet, fingers on the ends of hands and the facial features are distinctly human. An eight week embryo is shown in Exhibit "G".

At ten weeks expression is evident on the faces of these unborn babies and squints, sneers, mouth opening, and sucking hve been observed. At the end of the third month all organ systems of the body are present and functional. The external genital region is obviously male or female. The ears can pick up sound and the bones in the skeletal system are becoming ossified. All of the named muscles in the body are present. All of this occurs within in the first trimester of human life. Exhibit "H" is a photograph of a fetus at the end of the first trimester of life.

As the unborn child enters the fourth month of life or beginning of the second trimester his or her skin is still very thin, the eyes have become sensitive to light and there are lashes and eyebrows on the face. The unborn baby is approximately six inches in length and weighs approximately one-quarter of a pound at this time. The fetus at four months is shown in Exhibit "I". At five months there are distinct fingerprints on the digits. Interrestingly, fingerprints are the criterion by which we are legally declared individuals. Exhibits "J" and "K" are photographs taken in the fifth month. At six months the unborn baby is approximately twelve inches in length and weighs approximately one pound. A sixth month old fetus is shown in the photograph marked Exhibit "L".

Sleep/awake cycles are present by seven months or beginning of the third trimester when the muscles are powerful from vigorous exercise inside the uterus. The final photograph, Exhibit "M" was taken in the seventh month of life. During the last two months of pregnancy the unborn

baby attains his or her birth size and prepares for life outside the uterus. The moment the individual is outside the mother's body, he or she is no longer called a fetus but a newborn. The name change occurs whether the new individual was inside the uterus for only three months or nine months. He or she has the same unique living body before birth as after birth, only the technical name for the stage of life changes at the moment of birth. The navel that is front and center of every postnatal human body is an external remnant and reminder of the prenatal phase of every individual's life.

/s/ Raymond F. Gasser
Raymond F. Gasser, Ph.D

Sworn to and subscribed
before me, notary public,
on this 1st day of
August, 1991.

/s/ Betty F. England
NOTARY PUBLIC

92-1066
NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1992

GOVERNOR EDWIN EDWARDS, ET AL.
Petitioners

v.

SOJOURNER T., ET AL.
Respondents

RICHARD IEYOUB, ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND HARRY CONNICK, SR., DISTRICT ATTORNEY FOR THE PARISH OF ORLEANS,
Petitioners

v.

DR. IFEANYI CHARLES OKPALOBI
Respondent

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* LOUISIANA LAWYERS FOR LIFE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF THE ATTORNEY GENERAL AND GOVERNOR OF LOUISIANA AND THE DISTRICT ATTORNEY OF ORLEANS PARISH

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of Amicus 1

Summary of Argument 2

Argument 3

Introduction 3

The Dialogue of Liberty 4

The Civil Law's Contribution 7

The Historical Basis of Judicial Review 10

This Court's Privacy Decisions 12

Policy Considerations 13

Conclusion 16

TABLE OF AUTHORITIES

CASES: **Page**

Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960) 13

Dr. Bonham's Case, 8 Co. Rep. 113b, 118, 77 Eng. Rep. 646, 652-653 (C.P. 1610) 10,11,12

Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) 12,13

Casey v. Planned Parenthood, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) 1

Day v. Savadge, Hobart 85, 87, 80 Eng. 235 (C.P. 1615) 5,10,11

Dietrich v. Northampton, 138 Mass 14 (1884) 9-10

Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) 1,12-13,15,17

Dred Scott v. Sandford, 19 How. 393, 60 U.S. 393, 15 L.Ed. 691 (1857) 2,5,6,7,13,15,16

Entick v. Carrington, 19 How. St. Tr. 1029 (1765) 10

Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921) 13

TABLE OF AUTHORITIES (continued)

CASES: **Page**

Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 12

Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1946) 13

On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) 13

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Marie Louise, f.w.c. v. Marot et al., 9 Louisiana Reports 473 (La. 1836) 6,7

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927) 13

Prohibitions del Roy, 12 Coke 63 (1612) 11

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 1,12-13,15,17

Somerset against Stewart, 98 Eng. Rep. 499, 20 St. Trials (N.S.) 1, 82 (K.B. 1772) 6

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) 13

Scott v. McPheeters, 33 Cal. App. 629, 92 P.2d 678 (1939) 13

TABLE OF AUTHORITIES (continued)

CASES: **Page**

Torigan v. Watertown News, 225 N.E.2d 926 (1967) 10

United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932) 13

Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) 13

Wilkes v. Wood, 19 How. St. Tr. 1075 (1775) 10

CONSTITUTION OF THE UNITES STATES

Privileges and Immunities Clause of Article 4, Section 2 4,10,13

Ninth Amendment 9

Tenth Amendment 9

Fourteenth Amendment 13,15

STATUTES:

Treaty Between the French Republic and the United States, concerning the Cession of Louisiana, signed at Paris the 30th day of April, 1803, . 3,9

Act of Congress April 8, 1812, c.50, 2 U.S. Stat. 701 (Act of Admission) 9

Louisiana Digest of 1808 3,8

TABLE OF AUTHORITIES (continued)

CASES: **Page**

Louisiana Civil Code of 1825 Article 29 8

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Caesar v. Greenleaf, 2 *Legal Papers of John Adams* No. 42 (Mass. Hist. Soc. 1965) 5,6,10,11

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Partida Fourth, Title xxi, Law 2 7

Partida Fourth, Title xxiii, Law 5 16

Lewis, *Life in Egypt Under Roman Rule* (Oxford: Clarendon, 1985) 8

Lincoln, "The Gettysburg Address" 11

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MISCELLANEOUS (continued)

Page

Otis, *The Rights of the British Colonies Asserted and Proved* (Boston 1964), reprinted in B. Bailyn (ed.) *Pamphlets of the American Revolution* 419 *et seq.* (Harvard 1965) 11,12,15

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MISCELLANEOUS (continued)

Page

Puffendorf, 6 *On the Law of Nature and Nations,* Ch. II (1688 edition, as translated by Profs. Oldfather, Oxford, 1938) 9,14

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INTEREST OF AMICUS

Amicus Louisiana Lawyers for Life is an organization of Louisiana attorneys who support the principle, traditional in the Civil Law, that children *in utero* should be protected by law. We are also mindful of this Honorable Court's legitimate concern with principles of institutional integrity and *stare decisis*. This brief is filed with the written consent of all Petitioners and Respondents as provided to the Clerk of this Honorable Court.

We are proud to be heirs of the best traditions of English-speaking peoples as expounded by this Court for 200 years. Our fidelity to the Rule of Law likewise includes the memory and experience of our Latin legal heritage, which extends back 2,000 years. *Amicus* can speak more frankly than the State itself. As Walker Percy observed of Louisiana:

> "The hope, often fulfilled, is that the union will bring together the virtues of each, the best of the two life-styles, industry and grace, political morality and racial toleration. . . . Unfortunately and all to often, the Latins learned Anglo-Saxon racial morality and the Americans learned Latin political morality. . . ."[1]

Louisiana needs both this Court's authority and its own laws to keep the peace. The Abortion Cases[2] under-

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[1] W. Percy, *Sign Posts in a Strange Land* 14 (N.Y. 1991); see also his novel, *The Thanatos Syndrome* (N.Y. 1987).

[2] As used herein, "the Abortion Cases" include *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), down through and including *Casey v. Planned Parenthood*, 112 S.Ct. 2791 (1992).

mine both. *Amicus* hopes, as a friend of the Court, to suggest a way out. Stating what we remember will show why the United States District Judge who applied the Abortion Cases below expressed the greatest reluctance.

SUMMARY OF ARGUMENT

Under the Privileges and Immunities Clause of Article 4, Section 2 of the Constitution, Louisiana acknowledged the rights of Black citizens of other states prior to *Dred Scott v. Sandford*, 60 U.S. 393 (1857). The Fourteenth Amendment was intended to continue the dialogue of liberty interrupted by *Dred Scott*, not to void instances where a state had already granted some persons protection of laws unknown in other states.

The inherent right of states to extend the protection of law to unborn children, exercised by Louisiana long prior to the Fourteenth Amendment, should be respected under the Privileges and Immunities Clause of Article 4, Sec. 2. Louisiana's inherent right is indistinguishable from that exercised by Massachusetts to recognize Blacks as citizens. The Civil Law tradition long recognized unborn children as human beings and legal persons. Reconsideration of the Abortion cases would enhance, rather than undermine, respect for the Court's decisions.

Though the legal authority of judicial review flows from *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803), its political authority historically flows from the appeal of the American Revolution to the common moral ground between English precedent and the European law of nations. This ground of political authority was disregarded in *Dred Scott*, and again in the Abortion Cases.

ARGUMENT

Introduction

The Treaty of Cession between France and the United States required that the inhabitants of Louisiana be incorporated in the Union, admitted to the enjoyment of "all the rights, advantages and immunities of citizens of the United States," and protected in "the free enjoyment of their liberty, property, and religion which they profess."[3] John Quincy Adams protested the treaty made "French and Spanish laws a part of the laws of the Union. . . ."[4] When the American governor appointed by Jefferson vetoed an Act declaring what Spanish and Roman laws were still in effect, the legislature dissolved itself in protest, stating: "We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair." *Manifesto* of the Legislative Council of the Territory of Orleans, May 28, 1806 in Yiannopoulos, *Louisiana Civil Law System*, Appendix p. 9. (Claitors, 1971). Subsequently, the *Louisiana Digest of 1808* of the Civil Law in effect was adopted and approved. Louisiana's general law remains the Civil Law.

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[3] Treaty Between the French Republic and the United States, concerning the Cession of Louisiana, signed at Paris the 30th of April, 1803, Article 3.

[4] T. Norton, *The Constitution of the United States: Its Sources and Application* 81 (N.Y. 1965).

Louisiana also embraced the public law of the United States Constitution. The Privileges and Immunities Clause of Article IV Sec. 2 of the Constitution was important to the inhabitants of Louisiana. It provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

This provision recognizes that the States retained the inherent right to extend their legal protection to persons subject to their jurisdiction, but must extend the same protection to citizens of other states as to their own citizens.

In 1828 the elected Governor of the State of Louisiana vetoed a bill which would have prohibited "free negros and persons of color from entering this state." C. Gayarre', *History of Louisiana*, Vol IV *The American Dominion*, p. 651 (1882):

> "The third, and last, constitutional objection to this bid, the Governor considered as 'equally strong.' He remarked that . . . the Constitution secures to the citizens of each State all the privileges and immunities of citizens of the several States. 'In the consideration of this bill,' said the Governor, 'it is only necessary to ascertain whether the persons who are its objects are citizens of any of the States of the Union. In this inquiry, the fact presses itself upon us, that, in some of the States, they are citizens to the full extent of the term. If we can exclude one portion of the citizens of those States, we can exclude the whole. If we are free to refuse ingress to them,

> they are equally at liberty to deny access to us; and thus the most fatal animosities and collisions might arise between the States, a calamity which it was the object of the Federal Constitution to obviate."

Thus ". . . a Governor of Louisiana . . . openly declared to her Legislature, that a negro was as much a citizen of Massachusetts as John Quincy Adams or Daniel Webster, and, as such, entitled in our State to all the rights guaranteed by the Constitution to these two distinguished men, or any other, white man . . . ." (*Ibid.*) Subsequently *Dred Scott v. Sandford, supra,* held to the contrary.

In *Caesar v. Greenleaf,* 2 *Adams Legal Papers,* No. 42, 64 (October 1772, Essex Inferior Court, Newburyport, Massachusetts), Plaintiff brought an action in trespass against Defendant for enslaving him, arguing that slavery did not exist under Massachusetts law. Plaintiff invoked *Day v. Savadge,* Hobart 85, 87, 80 Eng. 235 (C.P. 1615):

> "Some Legislatures So[uth]ward in the colonies have enacted, that blacks, as negroes are Slaves.
>
> Hobart 87. Act of Parliament. Jura naturae immutablia. An act of parliament against natural Equity, as to make one Judge in his own cause is void." (No. 42, *supra,* 67.)

Slavery itself had long been recognized as contrary to what was understood as natural law, though permitted by positive law.[5] *Caesar v. Greenleaf* produced the

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[5] Justinian's *Corpus Juris Civilis, Institutes* 1.2.2 restates such a recognition extending back to the Stoic jurists, Ulpian, *Digest* 50.17.32, and Florentinus, *Digest* 1.5.4.

argument that such positive legislation was void inasmuch as "the rights of nature are immutable." Plaintiff also invoked "*Sommersett's Case,*" (*Somerset against Stewart*) 98 Eng. Rep. 499, 510, 20 St. Trials (N.S.) 1, 82 (K.B. 1772), for the illegality of keeping in slavery a person brought to free soil. The jury of Massachusetts men found for the plaintiff and awarded damages for his enslavement. 2 *Adams Legal Papers* 51-52.

Judge John Minor Wisdom in his "Brief Remarks on the Bicentennial of the U.S. Constitution," 38 *La. Bar Journal* 238 (Dec. 1990), recalled how Louisiana had participated in a dialogue of liberty before *Dred Scott.* In *Marie Louise, f.w.c. v. Marot et al.,* 9 Louisiana Reports 473 (La. 1836), a "free woman of color" claimed the freedom of her daughter Josephine on the grounds "she was taken to France by the defendants, a country in which slavery is not tolerated, and she thereby became free." *Id.,* 474. The Louisiana Supreme Court affirmed recognition of freedom by the judge and jury below, observing that "[b]eing free for one moment in France, it was not in the power of her former owner to reduce her again to slavery."

In *Somerset against Stewart,* 98 Eng. Rep. 499, 510, 20 St. Trials (N.S.) 1, 82 (K.B. 1772), Plaintiff claimed freedom because he was brought for a time into England. His counsel invoked French and other European precedent. He observed of slavery that "[i]ncompatible with the mild and humane precepts of Christianity, it began to be abolished in Spain, as the inhabitants grew enlightened and civilized. . . ." Together the jury's decision in *Caesar v. Greenleaf* and other Massachusetts cases,[6] *Somerset,*

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[6] The editors of *Adams Legal Papers* take issue with Adams' recollection of the importance of the early slavery cases. 2 *Adams Legal Papers* 52. It nonetheless shows the evolving consciousness awakened by the Revolution. Slavery was held illegal in 1783 under the "free and equal"

supra, Marie Louise, f.w.c., supra, and the Louisiana Governor's veto demonstrate *Dred Scott* was erroneous *historically.* Members of this Court have recognized *Dred Scott* was disavowed by the Civil War Amendments, though it appears never to have overruled it judicially.

The Civil Law's Contribution

The *favor libertatis* or presumption in favor of liberty in Spanish law apparently started with a rescript of a non-Christian Roman Emperor: "the post-classical rule . . . that the child of a mother free at any time between conception and delivery would be free, also, may have has its origin in an isolated humane decision of Hadrian."[7] In time this bias toward liberty gradually but substantially led to a large population of "free persons of color" in Louisiana. The Spanish *Laws of Las Siete Partidas* (New Orleans, 1820), a translation commissioned by the Louisiana Legislature, *Partida* Fourth, Title xxi, Law 2 provided:

> "They who are born of a free man and a mother in slavery, are themselves slaves: for they follow the condition of their mother, as to slavery or emancipation. . . . But if the mother happen to be pregnant, and she be enfranchised, the child born of her will be free, *though she should not carry the child in her womb more than an hour, or less,* after she was enfranchised. And though the mother should afterward return to a state of slavery, the child would nevertheless, remain free, on account of the time whether great or small she

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Footnote continued

clause of the constitution of the Commonwealth of Massachusetts. (*Ibid.*)

[7] Nina Pugh, *Nasciturus: The Roman Classical Law on the Inception of Human Personality* (L.S.U. Thesis, 1963).

> had carried it in her womb, after she was emancipated. (Emphasis added.)

Thus the principle "being free for one moment" a person was forever free was first recognized in the case of unborn children.

Louisiana likewise extended the protection of Louisiana law to her unborn children generally. Article 29 of the Louisiana Civil Code of 1825, in effect before "the War," provided: "Children in their mother's womb are considered in whatever relates to themselves, as if they were already born. . . ."[8] Article 29 remained in effect as part of the Civil Code of 1870, adopted during Reconstruction to root out the last vestiges of slavery, until after the Abortion Cases began to be decided.

The instant case calls to mind the unilateral choice made under early Roman law on June 17th of what would be the year 1 B.C. in our calendar, by a husband, who, after expressing the most tender love for his pregnant wife, wrote her: "If you are delivered of a child, . . . if it is a boy, keep it, if a girl, discard it. You have sent me word, 'Don't forget me.' How can I forget you. I beg you not to worry.' " N. Lewis, *Life in Egypt Under Roman Rule* 54 (Oxford: Clarendon, 1985).

The principle of Article 29 reflects the *jus naturale* as understood in "the law of nations" expounded by accepted international law authorities of the day. Samuel von Puf-

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[8] *Louisiana Digest of 1808*, p. 8-9 Art. 7 had stated: "Children in their mother's womb cannot be reckoned among the number of children . . . . Yet the hope that such children may be born alive, causes them to be considered in whatever relates to themselves, as if they were already born. . . ."

fendorf observed that "obligation has also been enjoined upon parents by the law of nature, that . . . they not destroy by abortion the offspring conceived within their flesh, nor expose it, nor put it to death after it has been brought into the light of day. . . ." 2 *Elementorum Jurisprudentiae Universalis Libri Duo* Bk. 2. Obs. 5 p. 283 (Oldfather translation, Oxford, 1931). Puffendorf reasoned: "For while progeny is called into being out of the substance of parents, the result, however, is to place it in the same human lot as themselves, and to make it capable of suffering an injury even from the parents." 2 *De Officio Hominis et Civis Juxta Legem Natualem,* Ch. III, "On the Duties of Parents and Children," p. 98 (Moore Translation, Oxford 1927). Puffendorf cites Grotius as agreeing with him on a single exception to the principle that one cannot "destroy the child while unborn," to wit, "except in case both mother and the child would otherwise perish." Puffendorf, *On the Law of Nature and Nations,* Bk. VI, Ch. II, p. 918 (1688 edition, as translated by Profs. Oldfather, Oxford, 1938).

When Massachusetts joined the Union, it retained the inherent right to incorporate its understanding of natural rights into its own positive law by recognizing Blacks as human beings and legal persons, even before the adoption of the Ninth and Tenth Amendments. Pursuant to obligations under "the treaty made at Paris," Louisiana was admitted to the Union "on an equal footing with the original states." Act of Congress April 8, 1812, c.50, 2 U.S. Stat. 701 (Act of Admission). Louisiana thus retained the inherent right to incorporate the *jus naturale* by protecting unborn children as human beings and legal persons. Granted, *arguendo,* Massachusetts traditionally considered "the unborn child was a part of the mother. . . ."

Dietrich v. Northampton, 138 Mass 14 (1884).[9] Nevertheless, just as Article 4, Section 2 required Louisiana to respect Massachusetts' inherent right to protect its citizens of African descent, the same provision also establishes Louisiana's constitutional right to demand that the rest of the Union honor the legal protection of unborn children subject to Louisiana's jurisdiction.

The Historical Basis of Judicial Review

The very words "An Act against the Constitution is void" were uttered by James Otis on 24 February 1761 in *Petition of Lechmere*, 2 *Legal Papers of John Adams* (henceforth cited as *Adams Legal Papers*) No. 44, "Adams' Minutes of the Argument" p. 127 (Mass. Hist. Soc. 1965). "Then and there the child Independence was born," John Adams was later to write.[10]

Petition of Lechmere, supra, was the famous "Writs of Assistance" case, where the colonists challenged the functional, if not exact legal, equivalent of a general search warrant. It foreshadowed *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765) and Lord Mansfield's famous decision in *Wilkes v. Wood*, 19 How. St. Tr. 1075 (1775).

From Adams' notes in 2 *Adams Legal Papers* 128 the legal authority for Otis's argument that an act against the Constitution was void was Sir Edward Coke's opinion in *Dr. Bonham's Case*, 8 Co. Rep. 113b, 118, 77 Eng. Rep. 646, 652-653 (C.P. 1610), and Sir Henry Hobart's decision in

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[9] Overruled by *Torigan v. Watertown News*, 225 N.E.2d 926 (1967).

[10] 2 *Adams Legal Papers* 122. Historians dispute whether Adams' notes were written by him "at or near" the argument. Regardless of that, Adams's later statement shows the meaning of the event in American Revolutionary consciousness.

Day v. Savadge, Hobart 85, 87, 80 Eng. 235, 237 (C.P. 1615). Though *Day v. Savadge* mentioned natural equity and natural rights, *Dr. Bonham's Case* was not a natural law decision. Such a theory is inconsistent with *Prohibitions del Roy*, 12 Coke 63 (1612).[11] For Coke "common right and reason" meant precedent.

Otis expanded his argument in *The Rights of the British Colonies Asserted and Proved* (Boston 1964), reprinted in B. Bailyn (ed.) *Pamphlets of the American Revolution* 419 *et seq.* (Harvard 1965). Otis's own appendix thereto consists of Instructions voted by the City of Boston in May 1764 (*id.*, 471) and the "Substance of a Memorial" pursuant to those instructions. In it, Otis added Vattel, *The Law of Nations,* to the cases cited.

Otis there paraphrased *Dr. Bonham's Case* as "acts against the fundamental principles of the British constitution are void." He rephrased *Day v. Savadge* as "acts of Parliament against natural equity are void." Bailyn, *supra*, at p. 476. He declared these judicial declarations "agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion." (*Id.*, 476-477.)

This infusion of fundamental moral principles of natural law, as understood in the law of nations, into English liberty underlay not only the Declaration of Independence, but the very meaning of this Nation reflected in Lincoln's Gettysburg Address. As shown above, Otis's interpretation of *Day v. Savadge* was invoked against slavery in *Caesar v. Greenleaf.*

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[11] These three English cases can be found at Pound, *The Development of Constitutional Guarantees of Liberty* "Source materials," 112, 163-166, 171-176. (Yale, 1957.)

Joined with his restatements of *Dr. Bonham's Case* and of Vattel, Otis's interpretation led to judicial review. Vattel observed that the legislative power does not extend so far as to permit legislators to change the constitution of a country.[12] Otis paraphrased Vattel to urge it was "contrary to reason that the supreme power should have the right to alter the constitution," leading to consequences "not very remote from a flat contradiction." (*Bailyn, supra,* 477.) To (and from) an American consciousness so formed, Chief Justice Marshall addressed his historic words in *Marbury v. Madison,* 1 Cranch 137, 177 (1803).

This Court's Privacy Decisions

In *Boyd v. United States,* 116 U.S. 616, 625-627 (1886), this Court recognized James Otis' argument and the ensuing English cases as expressive of the very roots of our constitutional law. *Boyd* was cited for the right of privacy in *Griswold v. State of Connecticut,* 381 U.S. 479, 484-485 (1965). Yet there remain fundamental differences between *Griswold* and the Abortion Cases.

First, *Griswold* truly did involve violation of marital privacy. The Connecticut statute provided for one year imprisonment for any "person who uses any drug, medicinal article or instrument for the purpose of preventing conception. . ." *Id.,* 480. Griswold was found guilty as an accessory.

Most abortions statutes, including the Louisiana abortion statutes voided by the Abortion Decisions, do not make it illegal for a woman to obtain an abortion. They declare that the abortionist's conduct is criminal, but they

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[12] *Id.,* 476-477; Vattel, *The Law of Nations; or principles of the Law of Nature applied to the conduct of affairs of Nations and Sovereigns* printed (from a 1759 London translation) by Butler (Northampton, Mass. 1805) pp. 69-70 (1805).

do not evision a woman obtaining an abortion being prosecuted as an accessory. She is free to travel to other states under Art. 4, Sec. 2.

In the Abortion Cases the right of privacy was improvidently expanded to conflict with the Privileges and Immunities Clause of Article IV. Article 4, Sec. 2 was erroneously rendered a dead letter by *Dred Scott.* While the Fourteenth Amendment corrected the denial of Privileges and Immunities to Black citizens, it was never intended to divest unborn children of protection already extended by Louisiana law. Moreover, the other "several states" also had implicit authority to depart from the common law rule with respect to unborn children, as recognized by California in *Scott v. McPheeters,* 92 P.2d 678 (1939).

This Court has previously recognized that *Boyd* had been overgeneralized. *Boyd* was extended in *Gouled v. United States,* 255 U.S. 298 (1921), resulting in the "mere evidence" rule. It was applied in *Marron v. United States,* 275 U.S. 192, 195 (1927); *United States v. Lefkowitz,* 285 U.S. 452, 464 (1932), *Harris v. United States,* 331 U.S. 145, 160 (1946). Then came attempts to limit the overgeneralized "right to privacy." *On Lee v. United States,* 343 U.S. 747, 753 (1952); *Abel v. United States,* 362 U.S. 217, 235 (1960), *Schmerber v. California,* 384 U.S. 757, 770 (1966). Finally, this Honorable Court overruled the "mere evidence rule" in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 301-310 (1967), as not protective of the right to privacy. No constitutional crisis resulted.

Policy Consideration

Proponents of the right to choose in the sense op-

posed by Puffendorf,[13] *supra* sometimes argue that legislation such as Louisiana's imposes an undue burden upon the poor. But what is the impact of abortion itself? Indeed, "when the size of population groups is controlled for, it becomes apparent that the highest rate of abortion occurs among unmarried women less than 30 years of age who are nonwhite and non-Hispanic and have a family income of less than $11,000 per year." Goldsmith, "Researchers Amass Abortion Data," 262 *JAMA* No. 11, 1431 (September 15, 1989). In plain English, "nonwhite and non-Hispanic" means Black.

Louisiana can afford neither the inference that could be drawn someday from the disparate impact of procedures performed within its borders, nor silence about it. The statute at issue cannot justly be held unconstitutional on its face without consideration being given to very disturbing statistics. Under the Abortion Cases, Louisiana went from no reported legal abortions in 1973 to a high of 19,240 in 1985. (*Ibid.*) The CDC "Abortion Surveillance — United States, 1989," 41 MMWR No. SS-5, 1, 23-24 (September 4, 1992), reflects that there were 496 abortions per 1,000 live black births, as compared to 252 abortions per 1,000 live white births, for the 31 states for which data are available and the District of Columbia.

Is this Court absolutely *certain* it even wants our acceptance of the reality of legal abortion? Our acceptance would unravel legal, moral, cultural, historical and

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[13] Their attempt to distinguish between abortion and postnatal infanticide breaks down in practice. The motives for both are largely the same. For example, the State of Maharastra, India, where "clinical sex determination services" are advertised, passed unavailing legislation "to prevent the selective abortion of female fetuses by banning tests for prenatal sex determination." Radhakrishna Rao, "Sex selection continues in Maharastra," 343 *Nature* 497 (8 Feb. 1990).

religious threads woven into the fabric of our consciousness of our common humanity. Would our bare experience of each other in our largely separate lives be warm enough to carry us all safely through a winter's winds of man's seasonal inhumanity to man? The burden of proof of humanity imposed by the Abortion Cases invalidates truths we hold self-evident. A choice is necessary.

By granting writs to be made certain and informed, this Court can enhance popular respect for judicial review of constitutionality. This Court now has the opportunity, perhaps for the last time, to reconnect judicial review of constitutionality and recognition of our common humanity, both elements of American consciousness formed at the very beginning of the Revolution by Otis's argument, as expounded in *Rights of the British Colonists, supra*, Bailyn (ed.) *supra*, at pages 454-455 and 476-477 (acts of Parliament void), and 438-434 and 446-447 (black and white entitled to all "essential civil rights"), respectfully.[14] The Civil War Amendments can be understood as continuing the dialogue of liberty interrupted, as Lincoln understood, by *Dred Scott.* This chance to change history will be lost if this Honorable Court again acts from the fear expressed by Chief Justice Taney in *Dred Scott* that a different decision "would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day." Fehrenbacher, *Slavery, Law, & Politics: The Dred Scott Case in Historical Perspective* (Oxford, 1981), page 198.

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[14] Nash, Race and Revolution (Madison House, 1990) finds the belief slavery was inherently wrong was not confined to the North. Rather, it was widely perceived as inconsistent with Revolutionary principles because of "Otis's pamphlet, based on a natural rights argument . . . read throughout the colonies." (p. 8.) For the spread of the analogous French Revolutionary belief into Louisiana, see Kimberly Hanger, "Conflicting Loyalties: The French Revolution and Free People of Color in Spanish New Orleans," to be published in 34 Louisiana History No. 1 (Winter 1993).

Both *Dred Scott* and the Abortion Cases show how bad law can anesthetize the conscience. Each side now fails to acknowledge the hard cases[15] the other side raises. Hard cases can best be resolved in good faith by democratic legislatures.[16]

CONCLUSION

Wise action in this, as in other matters, begins with good judgment as to what one can and cannot change. Where the Court this century acted to further the dialogue of liberty, resumed after *Dred Scott* by the Civil War Amendments, it was able to bring about change. What the Court did had wide moral support. It was consistent with the ideals of the American Revolution. Like Lincoln, most Americans consider the Declaration of Independence part of the Constitution in a sense. In the sense of political, rather than legal, authority they are right. By the American Revolution this Nation constituted itself, on a moral basis expressed to the world, as a people having a decent respect for all of mankind.

Political authority is primary. That it flows from the consent of the governed is a matter of fact, not of law. Where political authority dies, as did the Crown's in the American colonies, no repetition of legal precedent can save it.

As lawyers we are very respectful of this Court's decisions over the past two hundred years. Yet no reitera-

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[15] Such hard cases are not altogether new. *Partida* 4, Title xxiii, law 5 recognized: "They ought not to be reckoned among children, who are not born with the human form; as if they have the head or other members of a beast. . . ."

[16] Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard, 1987) shows how compromises are in fact reached where the democratic political process is permitted to work.

tion of its hierarchic legal authority can erase from our hearts the memory that unborn children were long recognized under our own law and that of Continental Europe as human beings. Both our words and those of any District Judge would ring hollow if they tried to teach the people of this State that they were morally wrong on this issue. It is a fact, not a wish, that the Abortion Cases impair the moral and true political authority of this Court needed on other issues to keep the peace.

If this Honorable Court were to reconsider the Abortion Cases, allowing Louisiana once again to recognize the humanity of her unborn children, it would only admit, and re-establish, the Court's own humanity. What the Court did in the Abortion Cases was understandable. The full consequences of a unilateral right to choose were beyond the experience of the Common Law. The Civil Law had seen this issue before in the right of the Roman *paterfamilias*. The Court could well learn from the experience of the past twenty years what it took the Civil Law centuries to realize. We all have our share in both the frequent tragedy and the ultimate triumph of the true dialogue of liberty. We therefore respectfully urge this honorable Court to grant writs of certiorari in these cases.

Respectfully submitted,

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No. 92-1066

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARDS, et al.,

Petitioners,

v.

SOJOURNER T., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of **TEXAS BLACK AMERICANS for LIFE** as *Amicus Curiae* in Support of Petitioners Edwards, et al.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENTS 1

ARGUMENTS:

I. THE NEWLY ELUCIDATED FACTS CONCERNING FETAL PAIN, AND RECENT DEVELOPMENTS IN FETAL SURGERY, REQUIRE A REEXAMINATION OF *ROE v. WADE*. 1

A. There Are New Facts Concerning Fetal Pain. 1

B. There Are Recent Developments In Fetal Surgery. 8

C. There Is A Secular Reason For Acknowledging The Personhood Of Unborn Children. 9

D. Liberty Finds No Refuge In This Jurisprudence Of Doubt. 10

II. THIS COURT RECOGNIZED IN *DRED SCOTT* THAT FEDERAL COURTS LACK THE AUTHORITY TO COMPROMISE STATE PERSONHOOD FOR PURPOSES OF STATE LAW. 10

A. The State Of Louisiana's Acknowledgment Of The Personhood of Unborn Children Is A Rational Exercise Of State Sovereign Authority. 15

B. Federal Courts Lack The Authority To Grant The Relief Requested In This Case. 16

C. This Court Has Recognized Its Own Affirmative Duty To Notice Defects In Its Jurisdiction Or That Of The Courts Below. 17

D. Proposed Action On The So-Called Freedom Of Choice Act Makes This Issue Particularly Compelling Now. 18

CONCLUSION 19

TABLE OF AUTHORITIES

LEGAL

FEDERAL

CONSTITUTIONAL:

First Amendment 10, 14

Fifth Amendment 14

Tenth Amendment 17

Fourteenth Amendment 14

SUPREME COURT OF THE UNITED STATES:

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) 16

Bender v. Williamsport Area School Dist., 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) 17

Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Powell, J., concurring) 15

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (O'Connor, J., concurring) 16

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857) 1, 10-14, 17

Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 817,

82 L.Ed. 1188 (1938) 17-18

First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) 14

Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (*Pennhurst II*) 16, 17

Planned Parenthood v. Casey, ___ U.S.___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) 1, 6, 10, 16-18

Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part) 10, 16

Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Stevens, J., concurring in part and dissenting in part) 10, 14

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 1, 2, 10, 14, 16, 18

Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842) 17

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (Stevens, J., concurring) 10

U.S. v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944) 14

Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) 1, 18

Webster v. Reproductive Health Services,

492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Blackmun, J., concurring in part and dissenting in part) 10

Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Stevens, J., concurring in part and dissenting in part) 10

COURT OF APPEALS:

Page v. Schweiker, 786 F.2d 150 (3rd Cir. 1986) 18

STATUTES:

Freedom of Choice Act (proposed statute) 1, 18

STATE

State v. Jones, 2 Miss. (1 Walker) 39 (1820) 13

BIOMEDICAL

Capacity To Perceive Nociceptive Pain Believed Present as Early as Late Fetal Life and Birth, Anesthesiology News, May, 1992, at 5 2-3

Michael R. Harrison, et al., *Successful Repair In Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax*, 322 The New England Journal of Medicine 1582 (1990) 8-9

MD group claims that aborted fetuses suffer pain, American Medical News, Feb. 24, 1984, at 15 6-8

Post-abortion fetal study stirs storm, Medical World News, June 8, 1973, at 21 9

ROVING Reporter, Anesthesiology News, May, 1992, at 4 3-4

David J. Steward, *Anesthesia for Neonates and the Grown-Up Premie, reprinted in* American Society of Anesthesiologists Regional Refresher Course, San Diego, Calif., June 27-28, 1992, 204, at 1 5-6

Myron Yaster, *Anesthesia for Surgical Emergencies in Newborns, in* Principles and Practice of Anesthesiology, Vol. 2, Chap. 82, 2137 (Mark C. Rogers, et al. eds. 1993) 4-5

MISCELLANEOUS

Petition for a Writ of Certiorari in this case 15, 17

Brief on Behalf of Petitioner Erie Railroad Company in *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 17

INTEREST OF THE *AMICUS*

The *amicus* Texas Black Americans for Life is an organization which is concerned about the use of abortion as a tool of racial genocide against the African-American community. This brief is being filled with the consent of all of the parties.

SUMMARY OF ARGUMENTS

The newly elucidated facts concerning fetal pain, and recent developments in fetal surgery, require a reexamination of *Roe v. Wade*.

This Court recognized in *Dred Scott* that the federal government lacks the authority to compromise state personhood for purposes of state law. This issue is particularly compelling now, when Congress is poised to pass the so-called Freedom of Choice Act, which would negate state regulations concerning abortion found constitutional in *Webster v. Reproductive Health Services* and *Planned Parenthood v. Casey*.

ARGUMENTS

I. THE NEWLY ELUCIDATED FACTS CONCERNING FETAL PAIN, AND RECENT DEVELOPMENTS IN FETAL SURGERY, REQUIRE A REEXAMINATION OF *ROE v. WADE*.

A. There Are New Facts Concerning Fetal Pain.[1]

In *Planned Parenthood v. Casey* this Court noted that a change in the facts as they are known about an issue constitutes a basis for reexamining precedent. ___U.S. ___, 112 S.Ct. 2791, 2809, 2811-2814, 120 L.Ed.2d 674, 700, 705-706 (1992). We wish to advise the Court of certain facts concerning unborn children's perception of pain which were unknown in 1973 when this Court decided

1.) We wish to thank Dr. Ronald E. Harbut, M.D., Ph.D., Director of Anesthesia, Page Hospital, Page, Arizona, past Assistant Professor of Anesthesiology, University of New Mexico, for his invaluable assistance in preparing this material.

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In fact, though this new body of facts began developing in the 1980's, the broad publicizing of these facts has reached a crescendo only within the past year.

The May, 1992 issue of Anesthesiology News reported that unborn children feel pain. The article said,

> "For decades, conventional wisdom, but not hard evidence, held that infants' immature nervous systems prevented them from fully experiencing noxious stimuli. There was also undocumented concern about the safety of infants receiving adequate anesthesia and analgesia: that the risks of hemodynamic and ventilatory instability associated with potent anesthetics outweighed the benefits.
>
> "In recent years, however, it has been clearly demonstrated that *even young preterm infants* have the capacity to feel pain. There is *convincing* evidence, in fact, that the 'hard wiring' capacity for nociception [pain perception] is present not only at birth but *in late fetal life.* The often-cited incomplete myelinization in infants may be offset by the smaller interneuronal distances that nociceptive impulses need to travel to reach the higher centers, said Dr. [Lonnie K.] Zeltzer [the director of the UCLA pediatric pain program]."[2] [emphasis supplied]

The article also noted that recent "...biochemical and anatomic findings support the view that newborns can *and do* experience pain *just as adults do.*" *Id.* [emphasis supplied] The article, quoting Dr. Zeltzer directly, also said,

> " 'We *owe* it to infants who cannot express their pain to be observant, to look for physiologic indicators of pain, *in particular, to know that even in the very young preterm*, the capacity for nociception is there and that pain needs to be treated.' " *Id.* [empha-

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2.) *Capacity To Perceive Nociceptive Pain Believed Present as Early as Late Fetal Life and Birth*, Anesthesiology News, May, 1992, at 5.

sis supplied]

The article discussed pain perception even in nonviable fetuses, saying,

> "There is also data that the anatomic substrate for pain is present in fetal life, *as early as 20 weeks' gestation*, Dr. Zeltzer told listeners. During late fetal life and the newborn period, the density of cutaneous nociceptive nerve endings *equals or exceeds* that in adult skin." *Id.* [emphasis supplied]

****

> "There are indeed changes in pain perception that occur with age, she said. However, these changes are more related to alterations in behavioral manifestations of pain: to an increasing ability to anticipate pain and also to modulate pain, and to an increased emotional component of the pain response." *Id.*

All of this "provides the rationale for pain treatment even in *very* young preterm infants." *Id.* [emphasis supplied]

The article discussed research which has shown that inadequate anesthesia in term and preterm infants results in an increased stress response, a greater rate of complications, and higher mortality. *Id.* It also noted that exposing such children to painful stimuli without anesthesia leads to increased pain vulnerability in later life; this apparently is due to changes in the "wiring" in the neuronal nociceptive pathways which occurs in such children. *Id.*

An accompanying piece in that same issue asked five anesthesiologists the following question:

> "Do we need to provide pain relief to neonates and infants the same way as in adults?"

The answers are revealing:

1.) "Unequivocally, yes. Many people, particularly the older generation of surgeons, are of the firm opinion that neonates do not experience pain. Of course this is totally untrue..." [Dr. Edmond C. Bloch, Chief of Pediatric Anesthesia, Duke University, Durham, North Carolina].

2.) "We need to provide the same pain relief to neonates and infants as we do for adults, since children are considered our most precious possession." [Dr. Linda Jo Rice, Assoc. Prof. of Anesthesiology, Children's Hospital National Medical Center, Washington, DC].

3.) "Absolutely." [Dr. William B. McIlvaine, Pediatric Anesthesia Consultants, Denver, Colorado].

4.) "I believe it is vital to provide pain relief because neonates and children are real people." [Dr. Hernando De Soto, Chairman, Dept. of Anesthesiology, Riverside Hosp. and Clinic, Jacksonville, Fla.].

5.) "There is absolutely no question that neonates and infants perceive pain. So the question is: are there any reasons not to provide pain relief? To my knowledge, there are none." [Dr. Peter J. Davis, Assoc. Prof. of Anesthesia, Children's Hosp. of Pittsburgh].[3]

The textbook Principles and Practice of Anesthesiology is in accord. (The material quoted here is from the new, first edition of that book, which is listed as the "1993" edition.) It reads:

> **"Except for extraordinary circumstances, all newborns require anesthesia for surgery.** [citations omitted] **In the past, it was assumed that newborns neither experienced nor perceived painful stimuli to the same degree as adults.** [citations omitted] **Most believed that newborns did not have the neurologic substrate necessary for the perception of pain, either because of a lack of myelinization, incomplete pain pathways from the periphery to the cortex, or im-**

3.) *ROVING* REPORTER, Anesthesiology News, May, 1992, at 4.

> **maturity of the cerebral cortex. Absolutely no evidence indicates that any of this is true. Newborns respond to noxious stimuli with behavioral, physiologic, metabolic, and hormonal responses suggestive of substantial stress.** [citations omitted] Also, *clearly* the neurophysiologic pathways for nociception from the peripheral receptors to the cerebral cortex are developed *even in premature infants*. Furthermore, the primary pathways of pain transmission involve nonmyelinated C and A delta fibers, so postnatal myelination is not required for most pain perception. [citations omitted] Finally, failure to provide anesthesia is associated with an increased incidence of circulatory, respiratory, and metabolic complications in newborns. [citations omitted] Thus most evidence suggests that newborns not only respond to noxious stimuli, but that the failure to provide analgesia and anesthesia significantly increases perioperative morbidity and mortality."[4] [emphasis supplied] [Note: The portions in bold face here are printed that way in the text itself.]

We take particular note of the fact that this passage refers to potential "failure to provide anesthesia" and "failure to provide analgesia and anesthesia". But how can there be a failure to provide analgesia and anesthesia in the absence of a duty to provide them? And how can there be a medical duty to provide them if infants (even "premature infants", in the words of the text) are not persons? Thus it is left up to the legal community to devise some distinction between those who experience pain and suffering in the womb as opposed to those who experience it outside of the womb. But we have yet to see any rational distinction drawn between these two by anyone.

Consider also the following statement from a paper presented to a continuing education seminar in anesthesiology in June, 1992:

4.) Myron Yaster, *Anesthesia for Surgical Emergencies in Newborns, in* Principles and Practice of Anesthesiology, Vol. 2, Chap. 82, 2137 (Mark C. Rogers, et al. eds. 1993).

"For many years minor operations (e.g. circumscision [sic]) and even major surgery (e.g. ligation of patent ductus arteriosus) were performed on newborn patients without the use of any anesthetic or analgesic drugs. *We now know that this was wrong.* There is *convincing* evidence that the neonate can appreciate, and does respond adversely, to [sic] the pain of surgery. The use of adequate general or regional anesthesia and postoperative analgesic drugs will modify these responses to surgery and will improve the clinical outcome following surgery. *It is now a declared principle that the neonate should be considered for anesthesia on the same basis as older and adult patients; ie* [sic] *the decision to administer drugs is based on the physical state of the patient and not upon the maturity."*[5] [emphasis supplied]

It is worth emphasizing that the above statements all come from a news publication, a continuing education seminar, and a brand new textbook, each of which is designed to advise colleagues in the field not of old data or old news, but of the very latest developments in the field. In fact, it is worth noting that the paper from the continuing education seminar quoted above was presented to that seminar the very weekend before this Court announced its opinion in *Planned Parenthood v. Casey*.

These statements confirm what advocates of the rights of unborn children had been saying all along. For instance, in 1984 Dr. Vincent Collins, M.D., a professor of anesthesiology at Northwestern University, sent President Reagan a letter defending Mr. Reagan's assertion that unborn children feel the pain of an abortion. Excerpts of this letter, which was co-signed by two past presidents of the American College of Obstetricians and Gynecologists, were published in the Feb. 24, 1984 edition

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5.) David J. Steward, *Anesthesia for Neonates and the Grown-Up Premie, reprinted in* American Society of Anesthesiologists Regional Refresher Course, San Diego, Calif., June 27-28, 1992, 204, at 1. (Note: This paper is mistitled *Anesthesia for Neonates in* [sic] *the Grown-Up Premie* in the collection of papers presented to that seminar.)

of American Medical News. The letter read in part:

> "A fetus shows the precise behavior as you or I in avoiding pain. It is not a reflex, but an actual aversion to a needle or chemicals. He squirms away from any noxious influence."[6]

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"You stand on firmly established ground." *Id.*

In support of this Dr. Collins pointed out that:

1.) The cortex is developed between four and five weeks of age.

2.) Reflex actions can be observed between four and six weeks of age.

3.) Brain waves are detectable between six and seven weeks.

4.) Nerves connecting the spinal cord to peripheral structures have developed between six to eight weeks.

5.) Adverse reactions to stimuli are observed between eight and 10 weeks.

6.) Neurotransmitters capable of sending pain signals to the brain are present at 12 weeks.

7.) Opiate receptors, designed to provide analgesia, can be seen at 12 weeks. *Id.*

Dr. Collins also pointed out that in a saline abortion, unborn children feel "the same agony as an adult who has suffered burns over 80% to 90% of his body." As a result, the unborn child "squirms, throws himself around, and shows a total grimacing patterns [sic] of withdrawal." *Id.*

6.) *MD group claims that aborted fetuses suffer pain*, American Medical News, Feb. 24, 1984, at 15.

Dr. Matthew Bulfin, M.D., of Lauderdale by the Sea, Florida, added, "You can tell by the contours on their faces that aborted fetuses feel pain." *Id.*

At the very least, the states must be allowed to prohibit nontherapeutic experiments from being performed on those human lives within their jurisdictions who depend on the state for protection and who can feel the pain of the harm inflicted on them. The states must be allowed to regulate abortions in a manner which will provide a medical duty to administer anesthesia to the unborn before they are aborted.

B. There Are Recent Developments In Fetal Surgery.

A recent breakthrough in fetal surgery demonstrates the increasing need to allow the states to acknowledge the personhood of unborn children.

The mother herself was in no danger. Her child was. He was only 24 & 1/2 gestational weeks old, and he had a diaphragmatic hernia. This meant that his internal organs had entered the space in which his lungs were supposed to develop, preventing either lung from doing so. But his surgeons tried a new technique.

To begin with, in their own words, they gave "anesthesia for both mother and fetus".[7] They then drained and preserved the amniotic fluid, whereupon they performed the life-saving surgery on the child. The amniotic fluid was then replaced and the child was delivered by cesarean section 7 & 1/2 weeks later, at 7 & 1/2 months gestational age.

They did a follow-up, noting that at eight months after delivery "the baby is at home, growing and developing normally." *Id.* Significantly, in order to access the area which needed the surgery, they had to lift the child's arm out of the womb. *Id.*

7.) Michael R. Harrison, et al., *Successful Repair In Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax*, 322 The New England Journal of Medicine, 1582 (1990).

During the time of his surgery, with the amniotic fluid drained, one arm lifted out of the womb, and a team of skilled specialists performing the most technically advanced surgery known at that time on his internal organs, was this patient (at that time a viable fetus) a nonperson? And if he was a person then, did he later become a nonperson again when his arm was placed back in the womb, the amniotic fluid restored, and the womb closed back up? Or what?

C. There Is A Secular Reason For Acknowledging The Personhood Of Unborn Children.

A failure to recognize the personhood of unborn children has already led to the performing of ghastly experiments on unborn children; these began long before the recently discovered facts concerning pain perception by unborn children became known.[8] But unfortunately, the desire in the scientific community to further use unborn children for experiments does not seem to be abating.

The legal community may content itself to divide unborn children into different classes of persons for certain purposes but not for others. But in the medical community there are no legal fictions, only patients. No doctor ever had a legal fiction for a patient. No further schooling is needed by an M.D. in order to treat an unborn child. For only veterinarians have nonhuman patients.

Certain members of this Court have insisted upon there being a "secular purpose" for acknowledging the personhood of unborn children in order to satisfy the re-

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8.) In 1973 Dr. Peter A. J. Adam of Case Western Reserve University in Cleveland, Ohio, announced that he had gone to Helsinki and had severed the heads of twelve aborted children age twelve to twenty weeks of gestation and had kept them alive with fluids and a pump in order to perform experiments on them pertaining to carbohydrate metabolism. In response to objections concerning the ethical implications of such practices he replied, "[O]nce society has declared the fetus dead and abrogated its rights, I don't see an ethical problem..." *Post-abortion fetal study stirs storm*, Medical World News, June 8, 1973, at 21.

quirements of the First Amendment.[9] We hope this material will be of assistance to the Court.

D. Liberty Finds No Refuge In This Jurisprudence Of Doubt.

In *Planned Parenthood v. Casey* this Court said,

"Liberty finds no refuge in a jurisprudence of doubt." *Casey, supra,* ___U.S. at ___, 112 S.Ct. at 2803, 120 L.Ed.2d at 693.

If this Court does not allow the states to acknowledge the personhood of unborn children now, it will only needlessly put off the day when it must do so perforce. For the ever increasing awareness of the fetus as a patient will continually impeach the soundness of *Roe's* mistaken factual base, meaning that the uncertainty of *Roe's* continued validity can only grow more shaky as time goes on.

II. THIS COURT RECOGNIZED IN *DRED SCOTT* THAT FEDERAL COURTS LACK THE AUTHORITY TO COMPROMISE STATE PERSONHOOD FOR PURPOSES OF STATE LAW.

In *Dred Scott v. Sandford*, which denied the personhood of black slaves within the meaning of the federal constitution, this Court said,

"In discussing this question, we must not con-

9.) *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2849, 120 L.Ed.2d 674, 751 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part); *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2839, 120 L.Ed.2d 674, 739 (1992) (Stevens, J., concurring in part and dissenting in part); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 778-779, 106 S.Ct. 2169, 2188, 90 L.Ed.2d 779, 805 (1986) (Stevens, J., concurring); *Webster v. Reproductive Health Services*, 492 U.S. 490, 552-553, 109 S.Ct. 3040, 3075, 106 L.Ed.2d 410, 458-459 (1989) (Blackmun, J., concurring in part and dissenting in part); *Webster v. Reproductive Health Services*, 492 U.S. 490, 565-572, 109 S.Ct. 3040, 3082-3085, 106 L.Ed.2d 410, 467-471 (Stevens, J., concurring in part and dissenting in part).

found the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has *all the rights and privileges* of a citizen of a State, that he must be a citizen of the United States. He may have *all of the rights and privileges* of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. *For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights.* But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. *Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons;* yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, *although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character." Dred Scott v. Sandford,* 60 U.S. (19 How.) 393, 405-406, 15 L.Ed. 691,

700-701 (1857). [emphasis supplied]

This Court went on to say,

> "The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, *leaving it altogether with the several States* to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power *exclusively* to themselves." 60 U.S. at 426, 15 L.Ed. at 709. [emphasis supplied]

This Court made these statements despite the fact that this Court also expressly referred to black slaves as "an inferior class of beings" (60 U.S. at 405, 15 L.Ed. at 700), and "beings of an inferior order" (60 U.S. at 407, 15 L.Ed. at 701).

This Court's complete acceptance of the full rights of state persons against all the rights of all other persons in state court is made emphatic by this Court's rejection of such rights for state persons in courts outside of the state which recognized such personhood. This Court said,

> "It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Consitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.
>
> "The question then arises, whether the provisions of the Constitution, in relation to the per-

> sonal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

"The court think the affirmative of these propositions cannot be maintained." 60 U.S. at 406, 15 L.Ed. at 701.

Significantly, in 1820 the Supreme Court of Mississippi was faced with the question of whether a man who had killed a black slave could be prosecuted for murder. The unanimous court, citing uncontradicted authorities from other slave states for support, held that he could, saying,

> "Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase reasonable creature is a human being, for the killing a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher, and has not a slave as much reason as a lunatic, an idiot, or an unborn child?" *State v. Jones*, 2 Miss. (1 Walker) 39, 40 (1820).

Thus we see that a slave state equated an unborn child with all other persons, including a black slave, whom this Court found in *Dred Scott* to be someone whom a state could confer all of the rights and privileges of the law on in its own courts, free from federal interference.

It is not possible to say, as this Court did in *Roe*, that the states may not now do this without also saying (however unwittingly) that the *Dred Scott* decision *went too far* to the extent that it *would* allow one to have one's rights recognized under the law (*Roe, supra,* 410 U.S. at 162, 93 S.Ct. at 731, 35 L.Ed.2d at 182); it is to say also that the *Dred Scott* decision *did not go far enough in denying* one the right to have one's rights recognized under the law. And the statement of this Court in *Roe* that this is somehow accomplished by the Fourteenth Amendment is untenable on its face. (*See,* 410 U.S. at 152-162, 93 S.Ct. at 726-731, 35 L.Ed.2d at 176-182.)

This does not mean, as Justice Stevens suggests, that the states have the right to impinge on a federal natural person's First Amendment right to publish by declaring trees to be persons, and endowing trees with the right not to be killed (thereby effectively ending all publishing). *Planned Parenthood v. Casey*, ___ U.S. ___, n. 2, 112 S.Ct. 2791, 2839, n. 2, 120 L.Ed.2d 674, 739, n. 2 (1992) (Stevens, J., concurring in part and dissenting in part). For this Court has never had any trouble distinguishing between the rights which a natural person has and those which an artificial person, such as a corporation, may have.

This Court has noted, for instance, that an artificial person has no Fifth Amendment right against self-incrimination. *U.S. v. White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944). (But a corporation may be said to exercise a First Amendment right to free speech. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).) Similarly, a tree has no life of a natural person (i.e. a human life) which could be violated, even though it could be considered to be a person for virtually all other purposes. And, as noted above, this Court had no objection in *Dred Scott* to the states' placing "beings of an inferior order" on an equal footing in state court with those who enjoy federal personhood. (See pages 10-12, *supra.*)

The only question, then, is whether it is rational for a state to acknowledge the natural personhood of an

unborn child.

A. The State Of Louisiana's Acknowledgment Of The Personhood of Unborn Children Is A Rational Exercise Of State Sovereign Authority.

On the basis of the aforementioned newly elucidated facts concerning fetal pain, and the recent developments in fetal surgery, we submit that it is rational for the State of Louisiana to acknowledge the natural personhood of unborn children.

There are three other aspects of sovereign state authority in the field of abortion which we wish to discuss.

First, we wish to discuss a comment which the petitioners made in the petition itself. They noted that it was the case in Louisiana up until 1805 that the mother herself could receive the death penalty for procuring the abortion of her child. (Pet. at 26-27.) What this means in practical terms is that this provision was repealed almost immediately after Louisiana was purchased from France.

Consider this in light of the case in which this Court recognized that there is no constitutional right to engage in homosexual sodomy. Justice Powell filed a concurring opinion in which he noted that a penalty of incarceration for engaging in such conduct would raise a serious Eighth Amendment question. *Bowers v. Hardwick*, 478 U.S. 186, 197-198, 106 S.Ct. 2841, 2847-2848, 92 L.Ed.2d 140, 150-151 (1986) (Powell, J., concurring). The same wisdom applies here. To take the opposite approach would require this Court to strike down laws against spitting on the sidewalk simply because some state might someday prescribe the death penalty for such conduct.

Spitting on the sidewalk might become a capital offense someday in some state, but this does not go to the broader question of whether the states may prescribe some sanctions of some kind for engaging in such conduct. And we note that the State of Louisiana has no de-

sire now to impose the death penalty on women who procur an illegal abortion, nor has it done so for over 185 years.

Second, it is worth noting that although the recognition of state sovereign authority which the State of Louisiana is seeking here would, on its face, allow the states to proscribe abortion even if the mother's life were in danger, any such legislation would be unconstitutional, for it would fail the rational basis test. For if the mother dies, so also does her unborn child. We hope this addresses the concerns of Justice Blackmun on this point. *Planned Parenthood v. Casey*, ___U.S. ___, 112 S.Ct. 2791, 2854, 120 L.Ed.2d 674, 757 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part.

Third, we also note that this Court was concerned in *Planned Parenthood v. Casey* that without the *Roe* analysis, women could be forced to undergo abortions against their will. *Casey, supra*, ___ U.S. at ___, 112 S.Ct. at 2811, 120 L.Ed.2d at 703. But as Justice O'Connor pointed out in a case involving the other end of life's spectrum, any such action of this nature would constitute a classic example of a forcible restraint of one's liberty; it would also constitute an intrusion into one's body of the type that would burden the woman's liberty, dignity, and freedom to determine the course of her own life. Thus, it would run afoul of this Court's previously stated notions of constitutionally permissible state action. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 287-289, 110 S.Ct. 2841, 2856- 2857, 111 L.Ed.2d 224, 247-249 (1990) (O'Connor, J., concurring).

B. Federal Courts Lack The Authority To Grant The Relief Requested In This Case.

Since the jurisdiction of federal courts is limited rather than general, a federal court must not only have jurisdiction to hear the case, it must also have jurisdiction to grant the relief requested. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 2171 (1985); *Pennhurst State*

School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 267 (1984) (*Pennhurst II*). The statements of this Court in *Dred Scott* are too clear to admit of any doubt that the District Court lacked the authority to grant the relief requested.

C. This Court Has Recognized Its Own Affirmative Duty To Notice Defects In Its Jurisdiction Or That Of The Courts Below.

The petitioners themselves have drawn this Court's attention to the sovereign (i.e. Tenth Amendment) right of the states to acknowledge the personhood of unborn children for purposes of state law. (Pet. at 22-30.) To this we would add the following.

Consider, for example, this Court's landmark case of *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842). At no time did Erie Railroad Company raise any issue of whether federal courts had the authority to do what they were doing in that case; on the contrary, Erie Railroad Company stated, "We do not question the finality of the holding of this Court in *Swift v. Tyson*... ." (Brief on Behalf of Petitioner Erie Railroad Company at 27.) Yet consider the opening statement of the opinion of this Court in *Erie*:

> "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved." 304 U.S. at 69, 58 S.Ct. at 818, 82 L.Ed. at 1189.

This Court went on to say in that case that federal courts in fact do not have the authority to impose their own common law on parties in a case based on diversity of citizenship jurisdiction, overruling *Swift v. Tyson*.

More recently, this Court obtained the same result in a similar manner. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).

It is one thing to say, as this Court said in *Planned Parenthood v. Casey*, that this Court will not revisit a

prior holding simply because the members of this Court do not know whether they would have agreed with the Court's judgment and opinion were the matter before the Court in the first instance. *Casey, supra,* ___U.S. at ___, 112 S.Ct. at 2817, 120 L.Ed.2d at 711. But in *Casey* this Court took no notice of a potential defect in the authority of federal courts to grant the relief requested. And where there is an issue of a lack of authority to act, ordinary considerations of procedure in reviewing the order of a court below find no application. As the Third Circuit once said,

> "To affirm an order or judgment not within the judicial power of the United States would be as serious a usurpation as issuing such an order in the first instance." *Page v. Schweiker*, 786 F.2d 150, 153 (3rd Cir. 1986).

This same approach formed the underlying premise of this Court's action in *Erie*. In the instant case, we ask this Court to take notice of the lack of authority of the District Court to grant the relief requested.

D. Proposed Action On The So-Called Freedom Of Choice Act Makes This Issue Particularly Compelling Now.

This issue takes on particular importance at this time, when the United States Congress is debating, and may soon pass, the so-called Freedom of Choice Act, which would negate provisions of state law regulating abortion similar to those found permissible by this Court in *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), and *Planned Parenthood v. Casey, supra*.

Thus, if this Court does not overrule *Roe* and simultaneously mention the sovereign right of the states to endow whomsoever they choose with legal rights and interests for purposes of state law, this Court will allow a needless constitutional clash to ensue.

It would be in the best interests of federalism, comity, and judicial economy to state beforehand what the basis

is of the states' right to protect the unborn. Such a statement could prevent needless litigation over what can only eventually prove to be a vain exercise of authority by Congress. In this way it will be less likely that the people will be misled as to which direction our law is taking.

CONCLUSION

The State of Louisiana is only one state; but it is not less than one state. In recognition of its sovereign status as a state, and the rationally based need to allow the states to acknowledge the personhood of unborn children, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Nos. 92-1066 & 92-1157

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In the Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN W. EDWARDS, GOVERNOR OF THE STATE OF LOUISIANA, et al,
Petitioners

v.

SOJOURNER T., et al,
Respondents

and

HARRY CONNICK, SR., DISTRICT ATTORNEY FOR THE PARISH OF ORLEANS, et al,
Petitioners

v.

DR. IFEANYI CHARLES OKPALOBI,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENT, DR. IFEANYI CHARLES OKALOBI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are there compelling constitutional reasons for the Court to re-visit *Roe v. Wade* and its most recent progeny, *Planned Parenthood v. Casey*?

2. Is access to an abortion a right, privilege or guarantee that can be legitimately extrapolated from the Constitution?

3, If not, is Louisiana's anti-abortion criminal statute constitutionally flawed or legally defective in any other respects?

STATUTORY AND CONSTITUTIONAL PROVISIONS

The challenged legislation is Act 26 of the 1991 Regular Session of the Louisiana Legislature relative to abortion. The text appears as "Appendix D" at p. A-19 of the Petition filed herein on behalf of Edwin W. Edwards, Governor of the State of Louisiana and Richard P. Ieyoub, Attorney General of the State of Louisiana (the "Edwards Petition").

The relevant provisions of the Constitution of the United States applicable to the issues presented are:

A. Amendment X, and

B. Amendment XIV, the "due process" clause.

The relevant provision of the Louisiana Constitution of 1974 is Article I, Section 5 which specifically guarantees a "right of privacy" to all persons.

STATEMENT OF THE CASE

Except for the conclusions of law asserted in footnote 2 at p. 3 of the Edwards Petition, and the present tense of the assertion at p. 5 thereof that "Plaintiff Sojourner T. is pregnant," Respondent adopts by reference Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

There are at least two basic arguments on the issue of whether to grant or deny a writ of certiorari in this case.

1. *AGAINST*

Since just recently within the past year the Justices of this Court have labored and wrestled mightily with the abortion issue, it would appear unlikely that the Court will now either re-align itself and/or issue new and different pronouncements than those so extensively expressed and forcefully asserted in *Planned Parenthood v. Casey*, 505 U.S. ____, 112 S.Ct 2791, 120 L.Ed.2d 674 (1992). Thus, realistic expectations, coupled with the concept of "judicial economy," suggest that the Court will choose not to revisit *Roe v. Wade*, 410 U.S. 113, 93 S.Ct 705, 35 L.Ed.2d 147 (1973) and its progeny at this time.

2. *FOR*

Since we look to the Supreme Court for constitutional interpretation and guidance, the Chief Justice's uncontradicted acknowledgment in *Casey, supra*, as to "the confused state of this Court's abortion jurisprudence"[1] weighs strongly in favor of granting review at this time because of the multitude of uncertainties that still abound on the subject. All yearn for the issue to be resolved with a greater degree of certainty and within the constitutional framework of our republican form of government.

ARGUMENT

Because the *Casey* decision is so fresh in the Court's jurisprudence (June 29, 1992), any expectations that the several Justices will change their respective views and/or re-align themselves on the core constitutional issues

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[1] 112 S.Ct 2791 (1992) at 2855
120 L.Ed.2d 674 at 759

presented would now appear to be unrealistic. Unless such a presumption is unwarranted, it would appear to be in the best interests of judicial economy not to further agitate the issue at this time by the granting of a writ of certiorari in this case.

However, if there is even the slightest chance that some reconsideration of the fundamental underlying issue of constitutional construction could be forthcoming at this time, we would then earnestly contend as follows:

The District Court and the Court of Appeals below acknowledged their constitutional obligation to follow and apply this Court's prior pronouncements on the abortion issue as enunciated in *Roe v. Wade* and its progeny.

However, with the Louisiana litigants now at the Court's front door, this case assumes a greater and more compelling constitutional dimension. At this level, it presents the Court with an opportunity to effectively address a fundamental overriding constitutional issue which could well overshadow the various parties' legitimate, heartfelt and forcefully articulated interests in the national debate on abortion. This case, without reservation, squarely raises the fundamental issue of federalism, the resolution of which, at this juncture in our Nation's constitutional history, could have a lodestar influence upon American constitutional construction well into the 21st Century.

This case challenges the Court to candidly confront and decisively resolve the issue of whether the Constitution provides a privacy right of such breadth and scope as to pre-empt, with or without limitation, all state-legislated prohibitions against the act of abortion. The plurality in *Casey, supra*, seems to suggest that access to abortion is

not an "absolute" constitutional right, but rather a "conditional" one with sprinklings of legitimate state interests in the regulation of the activity. This compromise approach may well have been formulated with the best and most honorable of intentions, but its potential for creating and perpetuating confusion and uncertainty does not judicially or practically serve the citizenry well.

The issue to be resolved here really isn't Louisiana's abortion statute; for whether the Court chooses to grant or to deny review in this case, that statute is legally doomed. Its demise and ultimate legal burial will result from any one of the following:

i. denial of the request for writ of certiorari in this case,

ii. the unconstitutionally-elusive vagueness of the various exception provisions of this criminal statute which then causes the statute to outlaw all abortions,

iii. the application of the 1974 Louisiana Constitution's clear, absolute and specific guarantee of the "right to privacy":

> "Every person shall be secure in his person ... against unreasonable invasions of privacy." *Louisiana Constitution of 1974*, Article I, Section 5.

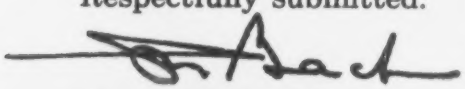
The petitioners here urge consideration of a facial challenge to the statute. But before engaging in that exercise, the Court should first determine whether, with the dawn of the 21st Century now approaching, it is willing to directly confront and decisively resolve the vital

constitutional issue of federalism raised by this case, i.e., whether, through judicial construction, the Constitution should be expanded to questionably permissive reaches for the purpose of resolving issues which the American people, under their republican form of government, are entitled and capable of resolving, within recognized constitutional limitations, through their respective elected state and/or federal legislative representatives.

CONCLUSION

If the Court is ready and willing to address that important and fundamental issue, then respondent would have no opposition to the granting of the writ of certiorari requested by petitioners in this case. Otherwise, the request for writ should be denied.

Respectfully submitted:



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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether Act 26 of the 1991 Louisiana Legislature, banning virtually all abortions and many commonly used methods of birth control, is unconstitutional on its face under this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992)?

PARTIES TO THE PROCEEDING

Plaintiffs-Appellees below and Respondents herein are Sojourner T., Jane and Ida B., on behalf of themselves and all other similarly situated; James DeGueurce, M.D., Calvin Jackson, M.D., and Pamela Branning, M.D., on behalf of themselves and all others similarly situated, and their patients; Hope Medical Group for Women; Delta Women's Clinic West; Causeway Medical Suite; Emilia Bellone, M.S.W., on behalf of herself and her clients; Reverend Kathleen Korb and Rabbi Michael Matuson, on behalf of themselves and their congregants; and Dr. Ifeanyi Charles Okpalobi.*

The Defendants-Appellants below and Petitioners in the case at bar are Edwin Edwards, as Governor of Louisiana; Richard P. Ieyoub, as Attorney General of Louisiana; and Harry Connick, as District Attorney for the Parish of Orleans.

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* Dr. Okpalobi is separately represented by Sidney Bach in this Court, and has filed a separate Brief in Opposition to Certiorari.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS IN ABORTION AND CONTRACEPTION CASES 8

II. CONTRARY TO PETITIONERS' ARGUMENT, FACIAL CHALLENGES ARE ROUTINELY PERMITTED OUTSIDE THE CONTEXT OF THE FIRST AMENDMENT 14

CONCLUSION 21

APPENDIX 1a

TABLE OF AUTHORITIES

Cases: **Page**

Aptheker v. Secretary of State,
378 U.S. 500 (1964) . . . . . *passim*

Barnard v. Thorstenn, 489 U.S. 546 (1989) 15

Bellotti v. Baird, 443 U.S. 622 (1979) 13

Carey v. Population Servs. Int'l,
431 U.S. 678 (1977) 9

Chapman v. United States, 111 S. Ct. 1919 (1991) . . 19

City of Akron v. Akron Ctr. for Reproductive Health,
462 U.S. 416 (1983) 13, 14

Cleveland Bd. of Educ. v. Lafleur,
414 U.S. 632 (1974) 18

Colautti v. Franklin, 439 U.S. 379 (1979) 13

Dunn v. Blumstein, 405 U.S. 330 (1972) 16, 18

Edwards v. Aguillard, 482 U.S. 578 (1987) 18

Eisenstadt v. Baird, 405 U.S. 438 (1972) 9

Griswold v. Connecticut,
381 U.S. 479 (1965) 9, 12, 13

Guam Soc'y of Obstetricians & Gynecologists v. Ada,
962 F.2d 1366 (9th Cir.), *cert. denied*,
113 S. Ct. 633 (1992) 6

Guste v. Weeks, 429 U.S. 1056 (1977) 8

Harper v. Virginia Bd. of Education,
383 U.S. 663 (1966) 15

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) 13

Hynes v. Mayor of Oradell, 425 U.S. 610 (1975) . . . 19

In re Initiative Petition No. 349, 838 P.2d
1 (Okla. 1992), *cert. denied*, 61 U.S.L.W. 3480
(U.S. Jan. 11, 1993) (No. 92-784) 6

Kraft Gen. Foods v. Iowa Dep't of Revenue,
112 S. Ct. 2365 (1992) 15, 20

Mitchell v. Tillman, 469 So. 2d 363
(La. Ct. App. 1985) 5

Moore v. City of East Cleveland,
431 U.S. 494 (1976) 15, 16

NAACP v. Alabama, 377 U.S. 288 (1964) 13, 17

Ohio v. Akron Ctr. for Reproductive Health,
110 S. Ct. 2972 (1990) 9, 12

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 15, 15-16

Planned Parenthood v. Casey, 978 F.2d 74
(3d Cir. 1992) 11

Planned Parenthood v. Casey, 112 S. Ct. 2791
(1992) . . . . . *passim*

Planned Parenthood v. Danforth,
428 U.S. 52 (1976) 13

Roe v. Wade, 410 U.S. 113 (1973) . . . . . *passim*

Rust v. Sullivan, 111 S. Ct. 1759 (1991) 10

Scales v. United States, 367 U.S. 203 (1961) 19

Shapiro v. Thompson, 394 U.S. 618 (1969) 16

Stanley v. Illinois, 405 U.S. 645 (1972) 15

Webster v. Reproductive Health Servs.,
492 U.S. 490 (1989) 1, 10, 12

Weeks v. Connick,
733 F. Supp. 1036 (E.D. La. 1990) 1

United States v. Monsanto, 491 U.S. 600 (1989)) . . . 19

United States v. Reese, 92 U.S. 214 (1876) 19

United States v. Salerno, 481 U.S. 739 (1987) . . . *passim*

United States Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 15

United States Dep't of Agric. v. Murry,
413 U.S. 508 (1973) 15

Virginia v. American Booksellers Ass'n,
484 U.S. 383 (1988) 5, 19

Zablocki v. Redhail, 434 U.S. 374 (1978) 15, 19

Statutes:

Act 26 of the 1991 Louisiana Legislature . . . . . *passim*

La. Civ. Code Ann. art. 26 (West Supp. 1992) 3

La. Rev. Stat. Ann. § 9:121 (West 1991) 3

La. Rev. Stat. Ann. § 37:1285(A)(8)(a) (West 1988) . . 11

La. Rev. Stat. Ann. § 40:1299.35.0 (West Supp. 1992) . 3

La. Rev. Stat. Ann. § 40:1299.35.1(1)
(West Supp. 1992) 3

9 Guam Code Ann. § 31.20 4

Texas Penal Code Art. 1191 4

Utah Code Ann. § 76-7-301(1) (Supp. 1992) 4

Miscellaneous:

Sup. Ct. R. 10.1(a) 6

Sup. Ct. R. 10(c) 6

Fec. R. Civ. P. 60(b)(5) 1

Brief of 167 Distinguished Scientists
and Physicians, including 11 Nobel
Laureates, as *Amici Curiae*, *Webster*
v. Reproductive Health Servs.,
492 U.S. 490 (1989) (No. 88-605) 8

Petition for Certiorari in *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, No. 92-104 7

Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277 (1984) 17

Respondents Sojourner T., et al., oppose the Petitions for a Writ of Certiorari filed on December 18, 1992, and December 21, 1992, by the Governor and Attorney General of Louisiana, and the District Attorney of Orleans Parish, respectively. The Petitions seek review of a decision of the United States Court of Appeals for the Fifth Circuit holding Act 26 of the 1991 Louisiana Legislature, which would ban virtually all abortions in the State, unconstitutional under this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

COUNTERSTATEMENT OF THE CASE

Beginning immediately after this Court's decision in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), Louisiana began to take steps "to enact abortion legislation reminiscent of the dark ages." *Id.* at 521 (Opinion of Rehnquist, C.J.) (plurality opinion). Within one week of this Court's decision in *Webster*, petitioner Connick filed a motion pursuant to Fed. R. Civ. P. 60(b)(5) to lift an injunction against Louisiana's pre-*Roe* criminal statute banning abortion. *See Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990) (three-judge court) (pre-*Roe* law repealed by implication). Then, in its 1990 session, the Louisiana Legislature passed a bill banning virtually all abortions in the state. The bill was vetoed by then Governor Buddy Roemer.

Finally, on June 18, 1991, over the veto of Governor Roemer, the Louisiana Legislature enacted House Bill No. 112 as Act 26 ("the Act"), prohibiting virtually all abortions in Louisiana under penalty of one to ten years imprisonment and a fine of $10,000 to $100,000. *See* *A-

25-26.[2] Only abortions performed under the following narrow circumstances are "not . . . unlawful":

(1) "to preserve the life or health of the unborn child or to remove a dead unborn child"; or

(2) "for the express purpose of saving the life of the mother."

A-20. In addition, "within thirteen weeks of conception," A-21, an abortion may be performed:

(3) where the pregnancy is the "result of rape as defined in [La. Rev. Stat. Ann.] §§ 14:42, 14:42.1, or 14:43," and the rape victim obtains "a physical examination and/or treatment from a physician other than the physician who is to terminate the pregnancy within five days of the rape to determine whether she was pregnant prior to the rape," or "within five days of the removal of [an] incapacity" that prevents such an examination, and the "rape victim reports the rape to law enforcement officials"; or

(4) where the pregnancy "is the result of incest as defined in [La. Rev. Stat. Ann. §] 14:78, provided the crime is reported to law enforcement officials."

A-20-21. Abortion is defined as:

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[2] Citations to the petition by Governor Edwards and Attorney General Ieyoub are in the form "Pet. at __" and citations to its appendix are in the form "A-__"; citations to the petition of District Attorney Connick are in the form "*Pet. at __" and citations to its appendix are in the form "*A-__." Where possible, citations are given to the appendix to the former. Citations to the appendix to this Brief in Opposition are in the form "__a."

> [T]he performance of any of the following acts, with the specific intent of terminating a pregnancy:
>
> (a) Administering or prescribing any drug, potion, medicine, or any other substance to a female; or
>
> (b) Using any instrument or external force whatsoever on a female.

A-20. The Act, however, does not define "pregnancy." Instead, the operative term throughout the legislation -- indeed, throughout Louisiana law[3] -- is "conception." Conception is defined as "the contact of spermatozoan with the ovum," A-22; "unborn child" is defined as "the unborn

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[3] In 1981, the Louisiana legislature expressed its intent that the laws of Louisiana should protect fetal life from the moment of conception:

> The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State.

La. Rev. Stat. Ann. § 40:1299.35.0 (West Supp. 1992). A companion section, La. Rev. Stat. Ann. § 40:1299.35.1(1) (West Supp. 1992), most recently amended in 1981, specifically defines abortion as "the deliberate termination of a human pregnancy after fertilization of a female ovum . . . ." Other Louisiana statutes, not related directly to abortion, also assign rights beginning at conception or fertilization. For example, Louisiana's law regulating the legal status and uses of human embryos defines a human embryo as "an in vitro fertilized human ovum . . . composed of one or more living cells . . . ." La. Rev. Stat. Ann. § 9:121 (West 1991). *See also* La. Civ. Code Ann. art. 26 (West Supp. 1992) ("An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception.")

offspring of human beings from the moment of *conception* until birth," *id.* (emphasis added); and abortions in cases of rape and incest must be performed "within thirteen weeks of *conception*," A-21 (emphasis added). Because, unlike much other restrictive abortion legislation,[4] the Act penalizes termination of pregnancy that occurs after "conception" but before implantation of the fertilized ovum, the Act prohibits many commonly used methods of birth control, including the intrauterine device, the morning-after pill, and the low-dose pill, all of which sometimes act to prevent implantation of a fertilized ovum.[5]

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[4] The abortion ban statutes enacted recently in Utah and Guam both exclude pre-implantation terminations of "pregnancy" from their scope. The Guam statute defines abortion as "the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus." 9 Guam Code Ann. § 31.20. Similarly, Utah's statute defines abortion as "the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum . . . " Utah Code Ann. § 76-7-301(1) (Supp. 1992). Even the Texas statute struck down by this Court in *Roe* effectively excluded pre-implantation terminations of pregnancy: "By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused." *Roe v. Wade*, 410 U.S. 113, 117 n.1 (1973) (quoting Texas Penal Code Art. 1191).

[5] The Act's legislative history also supports its application to certain types of birth control. For example, in his June 14, 1991, veto statement, Governor Roemer wrote:

> As House Bill 112 was going through the legislative process, I attempted to offer amendments which would provide meaningful exceptions to the general restrictions on abortion. In the House Chamber, my amendments were not offered because the House voted to close off debate peremptorily. I attempted then to have my amendments introduced in the

(continued...)

This case was filed on June 18, 1991. On June 20, 1991, Judge Duplantier of the United States District Court for the Eastern District of Louisiana directed the parties to file cross-motions for judgment on the pleadings, thereby eliminating any opportunity for meaningful factual development in the case. On August 7, 1991, two days after the motions were filed, the district court held the Act unconstitutional on its face while simultaneously bemoaning the continuing validity of the central holding of *Roe v. Wade*. A-14-16. The next day, petitioners filed their notice of appeal.

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[5](...continued)

> Senate. I met with the author of the bill, Representative Theriot, and the Senate sponsor, Senator Bares, and asked if they would accept my amendments to the bill. They declined. I then asked that amendments be offered on the Senate floor, but they were not accepted by the Senate. Without these amendments the bill is too harsh and restrictive.

Appendix A at 1a (*Statement of Governor Buddy Roemer Regarding House Bill No. 112)*, at 1. One amendment offered by the Governor:

> would have clearly defined pregnancy and clearly allowed such accepted medical procedures as termination of a tubal pregnancy and insertion of an intrauterine device.

Id. at 2. The Legislature's rejection of this amendment supports a finding that the Legislature intended to reach the insertion of intrauterine devices and, indeed, any other type of birth control that might operate to prevent implantation of a fertilized egg. The opinion of Louisiana Attorney General Guste to the contrary; *see* A-24-30, is, under Louisiana law, "at most persuasive." *Mitchell v. Tillman*, 469 So. 2d 363, 365 n.3 (La. Ct. App. 1985) (citations omitted); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395 (1988). Indeed, because it is a self-serving opinion issued in the midst of this litigation, even its persuasive value is extremely limited.

The Court of Appeals unanimously affirmed the decision of the district court on September 22, 1992, holding squarely that this Court's decision in *Casey* invalidated the Act. A-5. Judge Garza concurred specially, lamenting this Court's refusal in *Casey* to overturn *Roe* completely, while properly recognizing that he was bound by *Casey*. A-8-10.

REASONS FOR DENYING THE WRIT

Petitioners make no claim that the decision of the Court of Appeals is "in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort." Sup. Ct. R. 10.1(a). Indeed, the decision of the court below is in harmony with each of the two courts -- one federal court of appeals and one state supreme court -- that have addressed the constitutionality of a ban on abortion following this Court's decision in *Casey*. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992); *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992), *cert. denied*, 61 U.S.L.W. 3480 (U.S. Jan. 11, 1993) (No. 92-784).

Instead, the only Rule 10 factor petitioners appear to invoke is that the court below "decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10(c). They argue that the Act must be upheld as facially constitutional under *United States v. Salerno*, 481 U.S. 739 (1987), because it may have "some" constitutional applications, particularly as to abortions performed for race or sex selection or to "harvest" fetal parts, as to post-viability abortions, and as to abortions

performed by non-physicians. *See* Pet. at 11; *Pet. at 8.[6] Thus, petitioners claim that the decision of the court below conflicts with *Salerno* and related cases, despite this Court's most recent holding in *Casey* that a ban on pre-viability abortions is unconstitutional regardless of whether the ban contains exceptions. 112 S. Ct. at 2804, 2821.

Contrary to petitioners' contention, the decision below in no way conflicts with this Court's decisions; rather, it is required by clear, controlling precedent of this Court. Moreover, petitioners have misconstrued and misrepresented the holdings of *Salerno* and related cases in an attempt to eviscerate all constitutional protection for the constitutional right to choose abortion. Both within its abortion jurisprudence and in other areas of constitutional law, this Court has not hesitated to invalidate statutes on their face when it is clear that fundamental constitutional rights will be severely burdened if the statutes are allowed to go into effect.

At bottom, then, the petitions in this case are no more than a request that this Court overrule its recent decision in *Casey*. *See* Pet. at 11-29. Petitioners advance no persuasive reason for this Court to reconsider its decision in

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[6] These arguments are virtually identical to those made by the Governor of Guam in his unsuccessful petition for certiorari to review Guam's ban on abortion. *See* Petition for Certiorari in *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, No. 92-104, at 8-15.

Casey to reaffirm *Roe*'s central holding,[7] and the petition must therefore be denied.

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS IN ABORTION AND CONTRACEPTION CASES.

Petitioners have failed to show that the decision below conflicts with any of this Court's prior abortion or contraception cases. In fact, the outcome in the case below was mandated by this Court's decision last Term in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992), in which this Court clearly and unequivocally "retained and once again reaffirmed" the "essential holding of *Roe v. Wade*," 410 U.S. 113 (1973); *see also id.* at 2821 ("[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from

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[7] Petitioners argue, *inter alia*, that this Court's holding in *Casey* that *stare decisis* supports reaffirmation of *Roe* is incorrect, and that *Roe* incorrectly described the state interest in prohibiting abortion as an interest in "potential life." Pet. at 12-17. Each of these arguments were carefully considered and rejected in *Casey*. 112 S. Ct. at 2808-16, 2817; *id.* at 2839 (Stevens, J., concurring in part and dissenting in part). In addition, Petitioners argue that "scientific knowledge available since *Roe v. Wade*" justifies the Act. Pet. at 17. However, developments in scientific knowledge since *Roe* have not removed the underpinnings of this Court's holding in *Roe* that "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus," 410 U.S. at 159, on when human life begins. *See* Brief of 167 Distinguished Scientists and Physicians, including 11 Nobel Laureates, as *Amici Curiae* at 3-7, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605). Petitioners' argument that Louisiana's civil law tradition uniquely gives Louisiana a compelling interest in fetal life from the moment of conception was presented to this Court and implicitly rejected in *Guste v. Weeks*, 429 U.S. 1056 (1977).

making the ultimate decision to terminate her pregnancy before viability") (Opinion of O'Connor, Kennedy, and Souter, JJ.). That the Act is unconstitutional under *Roe*, as reaffirmed in *Casey*, is beyond doubt.[8]

Although this Court has relied on *Salerno* in several recent abortion cases, each has involved speculative challenges to statutory provisions in the absence of factual support. These cases have held only that facial challenges cannot prevail when based on an implausible statutory interpretation or "worst-case analysis that may never occur." *See, e.g., Ohio v. Akron Ctr. for Reproductive Health*, 110 S. Ct. 2972, 2981 (1990) (*Akron II*).[9] Such a

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[8] Because the court below decided this case on other grounds, it did not reach the question of whether the Act violated the strictures of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny. *See* A-7 n.5; *see also* A-5-6 (despite general rule favoring decision on statutory rather than constitutional grounds, case would be decided under "clear holding of *Casey*."). Since *Griswold*, however, it has been a settled point of law that "the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception . . . . [R]egulations imposing a burden on [this right] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977); *see also Griswold*, 381 U.S. at 497 (Goldberg, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In *Casey*, this Court reiterated that it had "no doubt as to the correctness of those decisions." 112 S. Ct. at 2807. Because it imposes a criminal ban on contraceptives that work after fertilization, but before implantation, the Act also clearly fails to pass constitutional muster under these cases.

[9] In *Akron II*, this Court rejected an argument that a judicial bypass procedure for a parental notice statute was not sufficiently expeditious. By interpreting the number of "days" required for the bypass to mean "business days," and reasoning that the bypass procedure could occur at a time of the year when it would encompass three Saturdays, three

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test -- which only bars plaintiffs from bringing remote or speculative claims -- is not equivalent to Petitioners' proposed test, which would require plaintiffs to demonstrate that there is *no* constitutional application of a challenged statute. But no implausible or speculative interpretation of the Act is required to see that the Act is in direct contravention of *Roe* and *Casey*.[10]

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[9](...continued)
Sundays, and two legal holidays, the lower courts had calculated that the procedure could take up to 22 calendar days. *Id.* at 2980. This Court held, however, that "the mere possibility that the procedure may require up to twenty-two days in a rare case is plainly insufficient to invalidate the statute on its face." *Id.* at 2981. *See also Webster*, 492 U.S. at 523 (O'Connor, J., concurring) (rejecting challenge to Missouri's ban on the use of public facilities in the performance of abortions, which was based on the contention that the statute could be applied "against private hospitals using public water and sewage lines, or against private hospitals leasing state-owned equipment or state land"). Likewise, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), does not establish that the *Salerno* facial challenge test applies to all abortion regulations. There, the facial challenge to restrictions on abortion counseling in federally funded programs the government had violated no constitutional right since "the Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *Id.* at 1776. Here, the Act unquestionably violates the constitutional rights of women established in *Roe* and *Casey*.

[10] The Act prohibits virtually all abortions, both before and after viability. Indeed, even as to post-viability procedures, the Act is unconstitutionally restrictive because it permits only those procedures performed "for the express purpose of saving the life of the mother," A-20, and contains no exception whatsoever for the health of the woman. Both *Roe* itself, 410 U.S. at 164-65, and *Casey* require post-viability restrictions to "contain[] exceptions for pregnancies which endanger a woman's life *or health*." *Casey*, 112 S. Ct. at 2804 (emphasis added). Further, the Act conflicts with an existing Louisiana statute authorizing discipline of physicians for "[p]erforming, or assisting in the performance of, or procuring or abetting in procuring an (continued...)

Moreover, *Casey* itself rejects the application of petitioners' version of *Salerno* to abortion cases. In striking down Pennsylvania's husband notice requirement on its face,[11] the *Casey* Court wrote:

> Respondents attempt to avoid the conclusion that § 3209 [the husband notification requirement] is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. . . . Respondents argue that . . . the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. *We disagree with respondents' basic method of analysis.*
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> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on

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[10](...continued)
abortion or termination of pregnancy during the third trimester of pregnancy or after viability of the fetus, unless the physician determines that such abortion or termination of pregnancy is necessary, in his best medical judgment, in order to save the life *or health* of the pregnant woman and/or of the fetus (unborn child)." La. Rev. Stat. Ann. § 37:1285(A)(8)(a) (emphasis added) (West 1988).

[11] While the Court upheld a number of other challenged provisions of the Pennsylvania Act, it did so based on the record before it. *See, e.g.*, 112 S. Ct. at 2826; *id.* at 2824; *id.* at 2833; *see also id.* at 2880 (Scalia, J., dissenting). The case has been remanded for further proceedings and plaintiffs have moved to reopen the record so that the district court may make the further factual determinations necessitated under the new undue burden standard established by this Court. *Planned Parenthood v. Casey*, 978 F.2d 74, 78 (3d Cir. 1992).

> those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

112 S. Ct. at 2829 (citation omitted) (emphasis added). The critical inquiry, therefore, is whether "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[12] *Id.* at 2830. It is clear beyond peradventure that the Act will prohibit not only a "large fraction" of abortions, but virtually all of them.

The position urged by Petitioners runs counter not only to the test adopted by a majority of Justices in *Casey*, but also to this Court's decisions in a number of facial challenges to abortion statutes both before and after *Webster*, when the shift away from the strict scrutiny standard of review for abortion cases first began.[13] *See,*

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[12] By contrast, the dissenting Justices would have followed the approach urged by Petitioners herein and required plaintiffs in abortion cases to "show that no set of circumstances exists under which the [provision] would be valid." *See id.* at 2870 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Akron II*, 110 S. Ct. at 2980-81); *see also id.* at 2870 n.2 (complaining that the joint opinion "appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision."); *id.* at 2854 (Blackmun, J., concurring in part and dissenting in part) (the Chief Justice's test would be an "insurmountable requirement for facial challenges").

[13] Petitioners' analysis also conflicts with this Court's decisions concerning state regulation of contraceptives. For example, in *Griswold*, recognizing that a ban on the use of contraceptives would "achieve its goals" by having a "maximum destructive impact upon [the marital] relationship," *Griswold*, 381 U.S. at 485, the Court invalidated

(continued...)

e.g., *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). For example, in *Hodgson*, this Court struck down on its face the statutory provision requiring a minor to notify both parents before obtaining an abortion without allowing her the option of using a judicial bypass procedure. In so doing, the Court focused on the families of those minors who would not have notified both parents in the absence of the statute -- i.e., the "group for whom the law is a restriction." *Casey*, 112 S. Ct. at 2829. In particular, the Court examined the deleterious effects of this requirement on those families in which "the parent notified by the child would not notify the other parent." *Hodgson*, 110 S. Ct. at 2945; *see also id.* at 2966 (Kennedy, J., concurring in part and dissenting in part) (majority reached its result by finding that "law is unnecessary when notice produces favorable results . . . and irrational in all of the instances when it produces unfavorable results"). Thus, the Court invalidated the provision even though there was no proof that the burdens on families would be severe in *every* case. By contrast, the dissenting Justices would have upheld the two-parent notice requirement, even though "[l]ike all laws of general application, the Minnesota statute cannot produce perfect results in every situation to which it applies . . . ." *Id.* at 2969 (Kennedy, J., dissenting); *see also id.* at 2950 (O'Connor, J., concurring) (invalidating two-parent notice statute because of "its broad sweep and its failure to serve the purposes asserted by the State in too many cases").

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[13](...continued)
the ban because it "swe[pt] unnecessarily broadly and . . . invade[d] the area of protected freedoms." *Id.* (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)); *see also id.* at 498 (Goldberg, J., concurring).

Likewise, in *Akron I*, in invalidating a second trimester hospitalization requirement, the Court relied heavily on the fact that early second trimester abortions could be safely performed in an outpatient clinic. 462 U.S. at 437. Akron had argued, much like petitioners do now, that these examples of unconstitutional applications should not invalidate the requirement. *Id.* at 438. Nonetheless, the Court found that by preventing the performance of some abortions in an appropriate non-hospital setting, Akron "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *Id.*

Petitioners' request amounts to a plea that this Court undertake a radical rereading of plaintiffs' burden in facial constitutional challenges. If this Court adopts Petitioners' test, it must overrule each of the abortion cases noted above. An "as-applied" determination must then be made on a case-by-case basis, as those few doctors who are not chilled by the criminal and civil sanctions that may be imposed on them are charged under these laws.[14] *Casey* does not impose this regime on the right to choose abortion.

II. CONTRARY TO PETITIONERS' ARGUMENT, FACIAL CHALLENGES ARE ROUTINELY PERMITTED OUTSIDE THE CONTEXT OF THE FIRST AMENDMENT.

This Court's contraception and abortion cases are not exceptional; indeed, this Court has permitted facial challenges in a wide range of cases outside the First

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[14] Thus, Petitioner Connick explicitly advocates that *Casey* "be read" to require only that states allow the affirmative defense of "non-viability" to a general prohibition of abortion. *Pet. at 10-14. This is not a "reading" of *Casey*, but an overruling of it.

Amendment context. Under Petitioners' proposed standard, if a statute violates the Constitution in 99 out of 100 applications, the one constitutional application would force a court to ignore the 99 unconstitutional applications and uphold the statute. This, of course, cannot be, and is not, the law.[15]

The Court has not hesitated to strike down a statute on its face even when the statute could be applied constitutionally in some circumstances. *See, e.g., Kraft Gen. Foods v. Iowa Dep't of Revenue*, 112 S. Ct. 2365 (1992); *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1976); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Particularly where fundamental rights are burdened, the Court has regularly invalidated laws that operate unconstitutionally as applied to some people but not others. *See Zablocki*, 434 U.S. 374 (marriage); *Stanley*, 405 U.S. 645 (parental rights); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Aptheker*, 378 U.S. 500 (right to travel); *Pierce*, 268 U.S.

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[15] If it were, a statute authorizing the police to search *any* person, building or vehicle at *any* time, would be constitutional on its face because it could be constitutionally applied in some instances. Moreover, when dismissing a facial challenge, a court would be forced to identify at least one constitutional application of the statute, in essence rendering an advisory opinion on which applications of the statute are constitutional. It is not the role of the federal judiciary to identify minute constitutional applications of a statute, like the Act, that imposes a blanket prohibition on conduct generally protected by the Constitution.

510 (child rearing and education); *Moore*, 431 U.S. 494 (family choices).

This Court has struck down statutes in facial challenges even when the laws could be applied constitutionally to the very parties bringing the challenge. In *Aptheker*, the Court struck down a federal law prohibiting any member of a Communist organization from applying for a passport on the ground that the Act infringed the fundamental right to travel and thereby violated due process. The Court struck down the law on its face despite the claim that it could be applied constitutionally to the appellants themselves, who were found to be top-ranking Communist party leaders. *See* 378 U.S. at 525 (Clark, J., dissenting).

Furthermore, restrictions that infringe a fundamental right have been struck down even when the restrictions did not, in fact, prevent the party challenging the provision from exercising such a right. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (durational residency requirement for voting unconstitutionally infringes right to travel even though it did not deter plaintiff from moving); *Shapiro v. Thompson*, 394 U.S. 618, 650 (1969) (durational residency requirement for receipt of welfare benefits unconstitutional even though, in operation, few welfare recipients, and none of the litigants, were actually deterred from travel) (Warren, C.J., dissenting).

In adjudicating facial challenges, the Court has used an overbreadth analysis, similar to that used in the First Amendment context, to strike down provisions that impermissibly restrict constitutionally protected activity along with activity that may permissibly be restricted:

> It is a familiar and basic principle . . . that "a governmental purpose to control or prevent

> activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Aptheker, 378 U.S. at 508 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)). While recognizing that the right to travel was closely related to First Amendment guarantees, the Court in *Aptheker* made clear that a law infringing a fundamental right, such as the right to travel, would be subject to an overbreadth analysis as applied in First Amendment cases. *See id.* at 516 ("Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP v. Button*, 371 U.S. 415, and *Thornhill v. Alabama*, 310 U.S. 88.") Thus, overbreadth analysis has not been strictly limited to the First Amendment context. *See also* Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 285 (1984) ("A rule that proscribes significantly more conduct than is justified by the permissible governmental end may not be applied to the litigant, even though the litigant's own conduct could be prohibited. This is not only in the first amendment area, but whenever significant means-ends congruence is required by the applicable substantive constitutional law.").[16]

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[16] *Salerno* itself is in agreement with these cases. In *Salerno*, certain defendants challenged the provision of the Bail Reform Act of 1984 that allows for pre-trial detention based on a finding of future dangerousness. However, the defendants never "claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case." 481 U.S. at 745 n.3. In recognition of the general rules of standing, *Salerno* merely declined to invalidate the Act because it "might operate unconstitutionally under some conceivable set of circumstances" not applicable to the defendants in that case. *Id.* at 745.

Where a fundamental constitutional right is at stake, the statute must be narrowly tailored to serve legitimate state interests. "[T]he question is whether the [provisions] sweep too broadly." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644 (1974); *see also Aptheker*, 378 U.S. at 514 (the section "sweeps too widely and too discriminately across the liberty guaranteed in the Fifth Amendment; *Dunn*, 405 U.S. at 343 ("In pursuing [an] important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives.") (citations omitted). This analysis applies with full force to statutes restricting abortion. *Roe*, 410 U.S. at 155.

Moreover, where the critical analytic question concerns the *purpose* of a statute,[17] facial challenges must be permitted. "A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face . . . ." *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987). It is clear that the purpose of the Louisiana legislature in enacting this statute was to prohibit *all* abortions, except in a very few limited exceptions, and petitioners cannot now assert a purpose to restrict only post-viability abortions. Where the purpose of a statute is contested as unconstitutional, parties must be given the opportunity to challenge the law before it is put into effect,

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[17] In *Casey*, the Court made clear that the "undue burden" standard requires courts to inquire into the purpose of abortion laws: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. at 2820 (joint opinion) (emphasis added).

for the relevant determination does not depend upon the effects of the law, as applied, in operation.[18]

In striking down statutes as facially invalid, the Court has repeatedly rejected Petitioners' proposed rule that a law cannot be invalidated on its face, outside the First Amendment context, unless it can be shown that the law has no constitutional applications. Often, the Court has done so over a dissent that relied on the rule proposed by petitioners. *See, e.g.*, *Zablocki*, 434 U.S. at 409 (Rehnquist, J., dissenting); *Aptheker*, 378 U.S. at 521

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[18] Moreover, the Louisiana ban cannot be upheld against a facial challenge based on the claim that the ban can be read to apply constitutionally to post-viability abortions, to abortions performed for sex selection or to "harvest" fetal parts, or to abortions performed by non-physicians. The plain language of the Act clearly prohibits all abortions with only a few limited exceptions. This Court cannot, in an effort to find the law constitutional, rewrite it to apply only to certain abortions. While "a court should strive to interpret a statute in a way that will avoid an unconstitutional construction . . . it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991) (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)); *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1975) ("we are without power to remedy the defects by giving the ordinance constitutionally precise content"); *Scales v. United States*, 367 U.S. 203, 211 (1961) ("Although [the] Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ."). Nor can this Court sever the ban to uphold it as applied to those abortions which could constitutionally be prohibited and ignore it as to those abortions, which cannot be banned under *Casey* and *Roe*. "We are not able to reject a part [of the statute] which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional . . . from that which is not." *United States v. Reese*, 92 U.S. 214, 221 (1876).

(Clark, J., dissenting). However, the majority of the Court has declined to adopt this restrictive formulation.

Just last term in *Kraft*, 112 S.Ct. 2365, the Court invalidated a state income tax law that allowed a deduction for dividends received from domestic subsidiaries but not for dividends received from foreign subsidiaries, holding that the statute facially discriminated against foreign commerce in violation of the Foreign Commerce Clause. The Court struck down the statute despite the fact that it would not discriminate against foreign commerce in all applications. In his dissent, Chief Justice Rehnquist, joined by Justice Blackmun, relied on *Salerno* to argue that the statute should not be struck down on its face because it could be applied constitutionally in some cases: for example, the tax scheme would have no effect on foreign commerce when applied to a foreign subsidiary that is incorporated in a foreign country but engages in no foreign activity. 112 S. Ct. at 2372 (Rehnquist, C.J., dissenting). Nevertheless, the majority invalidated the law on its face.

CONCLUSION

Casey and *Roe* clearly establish that bans on abortion are unconstitutional on their face. Acceptance of Petitioners' request that this Court bar facial challenges to all abortion restrictions, including bans on abortion, would eviscerate the holdings of those cases and subject women to arbitrary and dangerous state laws. Further, a reversal of this Court's holdings in *Casey* would threaten the legitimacy of the Court and allow Louisiana and other states to return the dark ages. Therefore, the petitions for writs of certiorari must be denied.

Respectfully submitted,

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APPENDIX

Statement of Governor Buddy Roemer
Regarding House Bill No. 112

House Bill 112 criminalizes abortions, imposes a minimum mandatory penalty of one year at hard labor and imposes a minimum a mandatory fine of $10,000 on any person convicted of performing an abortion. The maximum penalty is 10 years at hard labor and a $100,000 fine. Self-abortion is allowed but professional, medical abortions are not. The bill purports to grant exceptions for the life of the mother, for rape and for incest.

First, I applaud the legislature in its efforts to restrict abortions. The open window for abortions must be closed in order to protect the life of the unborn, but meaningful exceptions must be drawn in order to protect the life and rights of the woman involved.

As House Bill 112 was going through the legislative process, I attempted to offer amendments which would provide meaningful exceptions to the general restrictions on abortion. In the House Chamber, my amendments were not offered because the House voted to close off debate peremptorily. I attempted then to have my amendments introduced in the Senate. I met with the author of the bill, Representative Theriot, and the Senate sponsor, Senator Bares, and asked if they would accept my amendments to the bill. They declined. I then asked that amendments be offered on the Senate floor, but they were not accepted by the Senate. Without these amendments the bill is too harsh and restrictive.

Just as I said a year ago, the bill fails to provide for adequate protection for rape victims. The 5 day requirement for a medical examination and the 7 day

requirement for reporting to law enforcement are unworkable and unrealistic in many cases. The lives and rights of women in Louisiana demand balanced and thoughtful consideration. Forcing a rape victim to report to law enforcement officials and seek medical treatment, all within a week of the crime, is an onerous burden. Under this bill, ignorance of the law would force a woman to bear and give birth it a child conceived in brutality if she is unable to meet this artificial and narrow 7 day test. Is this a meaningful exception? I think not.

While prompt reporting may be ideal, it ignores reality: rape is the most underreported violent crime in our nation, with less than 20% of all rapes ever being reported to law enforcement. Much of this refusal to report stems from fear, humiliation and a reluctance to go through a public trial. The requirement that a woman have only 7 days to decide about reporting to law enforcement is a harsh burden.

While a woman, ideally, should go to her doctor as quickly as possible after a rape, many do not. The reporting periods I have requested (30 days for the medical examination and 45 days for law enforcement) are not arbitrary, but rather are based on simply human biology--within 30 days of intercourse a woman's body begins to change if she is pregnant. At that point a woman is likely to seek medical help on her own.

[2] The proponents of this bill also maintain that any expansion of the reporting period will "open the door" for women to lie and doctors to conspire with women to obtain abortions. They ignore the fact that rape is a terrible, pervasive reality in this country with the Los Angeles Commission on Assaults Against Women reporting that approximately 1 in 3 women in America will be raped.

More importantly, they ignore the basic dignity and trustworthiness of women as well as the honor and professional ethics of the doctors with whom these women consult. Women need more time to make a real, meaningful choice in a traumatic atmosphere.

The second amendment which I submitted would have clearly defined pregnancy and clearly allowed such accepted medical procedures as termination of a tubal pregnancy and insertion of an intrauterine device. I offered this amendment at the request of many obstetricians and gynecologists in this state. As the bill stands now, its definitions and terminology are so vague that doctors will be unwilling to risk their liberty and their professional careers by terminating any form of pregnancy at all.

Finally, I offered a carefully drawn amendment which would permit abortions in cases where the fetus is profoundly deformed, and the deformity is incompatible with life itself. The practice of medicine has advanced to such a degree that such deformities can, and generally are, detected early in the pregnancy. The decision on whether to carry such a fetus to full term should be up to the woman and her family--not the legislature.

House Bill 112 dishonors women, shows great mistrust of doctors and their professional judgment, and unduly burdens the traumatized victims of rape.

For these reasons I will veto House bill 112.